



John



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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

JAMES LUKIN ROBINSON, ESQ.,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. X.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 15 VICTORIA, TO EASTER TERM, 16
VICTORIA, WITH A TABLE OF THE NAMES OF
CASES ARGUED, AND DIGEST OF THE
PRINCIPAL MATTERS.

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JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS :

THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

Attorney-General :

HON. WILLIAM BUELL RICHARDS:

Solicitor-General :

HON. JOHN ROSS.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

EASTER TERM, 15 VIC.

Present :

THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

MILLER V. CLARK.

Trespass—Right of crown agent to seize boards made from crown timber cut wrongfully.

Held, that under 12 Vic. ch. 30, a crown land agent is not authorized to seize boards made from crown timber cut wrongfully.

Robinson, C. J., *Dissentiente*, who held that such timber might be seized in the shape of boards, and not merely while unmanufactured ; and that even if this were otherwise, the plaintiff in this case, on the facts stated below, was not in a position to maintain trespass against the agent as a wrong-doer, and to recover from him the value of the boards.

Trespass for taking goods.

The defendant, in several special pleas, set up as a defence, that the timber seized by him had been cut on crown lands, in the county of Grey, without authority, and that he, as crown agent, seized it. The plaintiff replied “ *de injuria*.”

There were certain facts for the jury to dispose of on the evidence, which were left to their decision by the court—namely, whether a quantity of lumber, which consisted of seasoned deal boards, was really the property of the plaintiff, rightfully acquired ; or whether the plaintiff

had not, when the defendant, a crown land agent, came to seize it, admitted that it was not his, but had been brought to his mill by a third party, who, as he believed, had taken it wrongfully from unconceded crown lands. The jury found in the plaintiffs favour, so far as those questions were concerned which affected certain issues on the record, and £39 7s. 6d. damages.

Richards obtained a rule *nisi* for a new trial, on the law and evidence, and for excessive damages.

Cameron, Q. C., shewed cause.

The question was, whether the statute 12 Vic. ch. 30 authorizes the government agent to seize *deal boards* made from crown timber *cut wrongfully*, or whether the authority is not confined to the seizing of *timber*.

ROBINSON, C. J.—Whether “timber” includes deal boards in a general sense, and without reference to this particular act of parliament, is a point on which there is no room for doubt. It is “wood fit for building,” which is one of the definitions, and indeed the first definition, which Dr. Johnson gives of the meaning of the word; but I think, in the popular sense, and indeed in its legal sense, it means the trunk of the tree, and is employed only in designating the trunk, or any part of it, while it exists in its solid state, and not when it is cut up into boards.

But when I look at this statute I see reason to doubt whether the legislature did not mean to include, under the word “timber,” as used in the 7th and 11th clauses, boards made of the timber, as they certainly do include boards when they speak of timber in the fourth clause, for there they allow timber cut under licenses to be seized if the crown dues are not paid; and they say it shall be liable to seizure whether in the original logs or manufactured into deals, boards, &c.; and after having said this in express words, they then in the same clause add, that it shall be lawful for the officer to follow such *timber*, and to seize and detain the same—not repeating the words “deals” or “boards,” but leaving them to be included as we must, for the purpose of this clause, and also of the sixth clause, deem them to be included, under the word “timber.” Now

I cannot believe that the legislature intended to allow the officer to seize the wood, though cut up into boards, on account of the dues not being paid by persons who really had authority to cut and take the trees on paying the small duty, and yet not to permit a seizure of boards made from crown timber which had been cut without any license at all.

The 2nd, 7th, 8th, 9th, and 11th clauses are also material to be considered; and particularly the 7th clause, for that expressly enacts that the person who cuts timber without authority shall acquire no right to the timber so cut, or any remuneration for preparing it for market (that is for preparing it in any way for market); and if the trespasser who cut the timber in question could acquire no right, he could transfer none to this plaintiff, who nevertheless has recovered a verdict against the seizing officer for the value of the boards, though it appears from the evidence that he disclaimed any interest in them, and declared they had been brought to his mill by a person who he believed had cut them wrongfully from crown lands. I think he should be held to that declaration, or at least that he was bound to shew that the fact was clearly otherwise, if he could be permitted to do so, which I doubt, at least for the purpose of making the officer a trespasser. The statute expressly throws the *onus* of proof of a rightful cutting of the timber on the party in whose possession it is found. Even if the act must be held not to authorize the seizure of timber cut without license on crown land, after it has been sawed up into boards and is still lying at the mill, yet I cannot see the propriety of allowing this plaintiff to recover for the value, as if he had a *bona fide* property in the boards; for his sawing the crown timber into boards did not give him the property in the boards; he did not pretend that the trespasser had sold them to him; and if he had attempted to sell them, the 7th section of the statute must have made the sale illegal, as being made by a person who could have no property in what he had so acquired.

I think bare possession under such circumstances did not give a right to the plaintiff to sue the officer as a wrongdoer, and recover for their value. I refer, as bearing on this

point, to the case of *Elliott v. Kemp*, 7 M. & W. 312 (a). I think there should be a new trial without costs.

DRAPER, J. (after referring to the 1st, 2nd, 3rd, 4th, 5th, and 6th sections of the act—All the foregoing sections relate to licenses to cut, to vesting the right to timber cut under license or within the limits licensed, and to securing the payment of the crown dues, for which latter purpose a lien and power of seizure is given on and over the timber in any part of the province, whether in the original logs or cut into deals or lumber; but no *forfeiture* is contemplated under this part of the act; so far from it, that if a sale be necessary to raise the dues, and the cost of seizure and sale, any surplus is to go to the licensee.

The 7th section is the first of a penal series. It declares that any person who without authority shall cut, or employ others to cut, or assist in cutting “any *timber* of any kind” on public lands; or who shall remove, or assist in removing, any “merchantable timber” so cut, shall not acquire any right to the timber so cut, or any claim to remuneration for cutting or preparing the same for market, or conveying away the same, but shall incur a penalty of 15s. per tree, with costs, whenever the “*timber or saw logs made*” have been removed out of the reach of the officer, “*or it shall otherwise be found impossible to seize the same.*”

Section 11 provides that all “timber” seized under this act shall be deemed condemned, unless notice of claim be given within a calendar month from the day of seizure. In default of such notice, the timber may be sold. “All timber seized” must mean seized as forfeited, or as liable to forfeiture, for the provisions following are at variance with those previously enacted (sec. 6), where timber is seized for non-payment of dues.

The 4th section shews that the legislature had present to their minds the differences between “timber” in the original logs, and as manufactured into deals, boards, &c.; and to secure the payment of the crown dues seizure is authorised, although the “timber” has undergone the process of manu-

(a) See also *Baker v. Flint* 3 U. C. R. (O. S.) 89; *Colwell v. Reeves*, 2 Camp. 577, note; *Fenning et al. v. Lord Grenville*, 1 Taunt. 246.

facture into deals or boards. But then the seizure occasions no absolute forfeiture; nothing but the price agreed to be paid is to be got by the crown.

Where penalties are inflicted, it is different; there is a penalty of 15s. per tree, or a forfeiture of the timber if it can be seized. If a seizure can be made, the penalty is not to be inflicted. If the timber or saw logs are removed out of the reach of the officers, which I presume means out of the province, or if it shall otherwise be found impossible to seize the *same*—*i.e.*, the same timber—then only can the penalty of 15s. per tree be inflicted. Impossibility to seize does not mean *by removal*, for that is already specified. May it, or rather must it not mean an impossibility arising from that which has been done with the timber—as, suppose it put into and forming in part or in whole the frame of a building, or “manufactured into deals or boards?” Unless this sort of impossibility is meant, it can only become impossible to seize if the “timber” become lost, as in rafting and conveying through the province towards the market.

In my view, as long as it continues in the shape of lumber or saw logs, and is within the province, it is liable to seizure. If removed, or if so used or manufactured as to lose its *simple* character, seizure can no longer take place; then the penalty of 15s. per tree must be resorted to. I think, therefore, the jury were rightly directed.

Looking at the particular circumstances here, there is no doubt that the plaintiff, by his own conduct, threw much suspicion on his case. His assertion that the lumber was not his when the seizure was first made; his taking only one plank as his own afterwards; and his declaration that Bonchamp owned it, were all much against him. On the other hand, there was proof that Bonchamp had only brought 2,500 feet, which the plaintiff had bought and paid for; that some of the boards were made from timber cut on granted lands; that the boards, &c., seized had been cut as much as two years. These facts were all left to the jury; and no objection is made to the direction as respects them. I fully agree that there was much reason to infer that the principal part of the timber was cut on the government land;

but, looking at the very strict language of the statute, and the very strong powers it gives, and the burden of proof it throws on the possessors of timber, even to the distinguishing what has been cut on granted land or under license, when such timber is seized with other timber liable to seizure, I should hesitate before I granted a new trial, when a verdict has been found for a plaintiff on a case properly left to the jury. And, as on the only point objected to I think the direction was right, I am of opinion the rule should be discharged.

BURNS, J.—So far as this case depends upon the construction of the statute 12 Vic, ch. 30, "*An act for the sale and better management of timber upon the public lands*," I cannot say I have any doubt. The statute provides for two classes; the one in which the person getting out the timber does so under the authority of and by license from the government; and the other where the person is a trespasser, and has cut the timber without any authority. I do not see that the word *timber* is used throughout the act in any other than one sense. The object of the 4th, 5th, and 6th sections was, to extend the lien from the crown dues to the various shapes into which the timber might be manufactured, whether into deals, boards, or other stuff, and to follow the *timber*—that is, into the shapes in which it may be manufactured—and to seize and detain the same wherever it may be found, until the dues should be paid or satisfactorily secured. It was not intended to confound the term *timber* with deals, boards, or other stuff, but simply to make the manufactured articles liable to the crown dues the same as though not manufactured; and in the use of the word *timber* in the 5th and 6th sections we must understand as if the other words "*whether in the logs or manufactured into deals, boards, or other stuff*," were again repeated. The 6th and 8th sections relate to the other class. The seventh section imposes a penalty of 15s. per tree for cutting without license; and then the 8th section gives authority, upon certain evidence being furnished, that the commissioner of crown lands, or any officer or agent of the department, may seize the timber wherever it may be found within the limits of the province. There is no provision

here as in the other cases; for following the article into the manufactured shape. Then, it is to be read as in the 5th and 6th sections should be—that is, as if the other words, “whether in the log or manufactured,” &c., were repeated? I think not; and I think the proviso contained in the 8th section shews that it was the timber in the original sense that was meant; for where the timber so cut without license is made up with other timber into a crib, dram, or raft, or so mixed up at the mills or elsewhere as to render it impossible or very difficult to distinguish the timber so cut without authority from the other, then the whole would be forfeited. If “timber” here is to be read as meaning whether manufactured into deals, boards, or other stuff, then it would seem to follow that the mixture of the deals or boards would render the whole subject to forfeiture. This, I think, was never intended; and it appears to me that the true construction to give the word “timber” throughout the act is that which is usually understood in the trade, and that the provisions of the 4th section were to give the crown a lien upon that which had been cut by authority and upon which the dues were not paid, into whatever shape that might be manufactured; but that, as the person cutting without authority, and any who might assist or remove any timber, would be liable to a penalty of 15s. per tree, in addition to losing all remuneration for cutting and removing, &c., the provisions of the 8th section applied only to the timber before it was sawn up.

Per Cur.—Rule discharged.

LOGAN V. RYAN.

New trial—costs of, where verdict perverse.

When the question for trial depends upon established rules of law, and the jury, being properly directed, give a verdict in opposition to the charge, the party injured is entitled to a new trial *without costs*.

Ejectment. Trial before Robinson, C. J., at Toronto.

Verdict for the defendant.

J. Duggan moved to set aside the verdict, as being contrary to law and evidence, and the judge's charge.

Bell showed cause.

ROBINSON, C. J.—My brothers, having considered the evidence in this case, are of opinion, as we have already intimated, that there must be a new trial.

We only hesitated as to the terms on which it should be granted. Upon the authority of the cases of *Boyle v. Tamlyn*, 6 B. & C. 340, and of *Saunders v. Davis*, 16 Jur. 481, we think the plaintiff, under the circumstances of the present case, is entitled to a new trial without payment of costs, and more especially because the action related to right of property which depends on certain established rules of law to be applied to each case, and of which the parties should not be made to loose the benefit by the jury taking upon themselves, in a clear case, to act in disregard of such well established principles. Where the judge fails to lay down the rule in such cases correctly to the jury, the party suffering a wrong in consequence is held to be entitled to a new trial, without paying costs for it; and if he were not, complete justice would not be done to him. Where the judge, however, does give the proper direction to the jury, and they either mistake it or choose to act in opposition to it, it seems reasonable that the party injured by the verdict should be in no worse position, and so the courts in England have held. Where the judge expresses his opinion to the jury, as he frequently does, on matters which it rests with them rather than with him to pronounce upon, there are other considerations to be entertained, though the question of costs must, even in such cases, be, under some circumstances, a matter for the court to exercise their discretion upon.

Rule absolute, without costs.

FOX V. ROSE.

Partnership—Fraudulent sale of partnership effects by one partner—Trover by co-partner against the vendee.

One of two partners may recover in trover the value of partnership goods from the vendee of his co-partner, where there has been a fraudulent collusion between the vendor and vendee; but each partner has a power of sale over the effects of the firm, and the mere omission of the vendor to consult his co-partner is no ground of fraud as against the vendee. *Held*, therefore, that in this case the plaintiff could not recover the value of the partnership goods.

Trover. Pleas—1st, not guilty; 2nd, not possessed; 3rd,

that one Fetterly and the plaintiff were co-partners in manufacturing timber, and as such co-partners had become possessed as of their own property of the goods, &c.; and that before the said time when, &c., Fetterly sold the said goods to defendant for a valuable consideration, to be paid to Fetterly and the plaintiff—viz., 12*l.* 10*s.* per thousand—and justifies the conversion, giving express color to the plaintiff.

To this the plaintiff replied, that such sale was effected by Fetterly with the defendant in fraud of the plaintiff, defendant then well knowing the same; which the defendant traversed.

The case was twice tried. The jury on the first trial gave a verdict for the plaintiff for 115*l.*, which the court set aside, because there were peculiar questions applying to certain portions of the property for which this action is brought, which did not apply to another portion, and the jury had been directed in consequence to find separately the value of each, in order that the court might be able to come to such a decision upon the legal points involved as would finally dispose of the case. Disregarding this request, they found a general verdict for the plaintiff, giving him damages for the value of all the property in question. A new trial was ordered, on the application of the defendant.

The facts of the case were as follows:—Fox and one Fetterly had been in partnership, and the greater part of the goods sued for in this action had belonged to them, as partnership property; while there were other goods which were the property of the plaintiff alone, and which the jury valued at 10*l.* The other and larger quantity of goods which had been partnership property, the defendant claimed to have purchased from Fetterly, the plaintiff's partner; and the plaintiff maintained that this sale was fraudulently made and with the knowledge of the defendant, which the defendant denied.

BURNS, J., before whom the case was last tried, at Cornwall, directed the jury that the plaintiff could not be allowed to recover on account of any of the partnership property alleged to be converted, notwithstanding there was no plea

in abatement on account of nonjoinder ; for that he stood on a different footing from a mere joint owner of a chattel, it being impossible to ascertain on the trial what might be the value of his interest in the goods as between him and his partner Fetterly, because that must depend on the result of a settlement of their partnership accounts, which could only be gone into in a court of equity.

On this direction the jury gave a verdict for the plaintiff of 10*l.*, being the value of the goods belonging to the plaintiff alone, and which they found the defendant to have wrongfully converted.

Hagarty, Q. C., obtained a rule *nisi* for a new trial on the ground that the damages were too small, and that the plaintiff was precluded from recovering as much as he was entitled to by the improper exclusion of evidence. He cited *Fox v. Hanbury*, Cowper 449 ; *Brown v. Hedges*, Salk. 290 ; *Shirreff et al. v. Wilks*, 1 East. 48 ; *Ridley et al. v. Taylor*, 13 East. 175 ; *Bouker et al. v. Burdekin*, 11 M. & W. 128 ; *Longman et al. v. Pole et al.*, 1 M. & M. 223 ; *Addison v. Overend*, 6 T. R. 766 ; *Sedgworth v. Overend et al.*, 7 T. R. 279 ; *Scott v. Godwin*, 1 B. & P. 74 ; Chy. on Plg. 1, 72, 75.

Vankoughnet, Q. C., shewed cause, and cited Story on Partnership, p. 196.

ROBINSON, C. J.—I think that the direction of the learned judge was not strictly accurate. The case of *Longman et al. v. Pole, et al.*, 1 M. & M. 223, is in point ; and there seems to be no good reason why a partner should in any such action against a third party stand on a different footing from any other joint owner of a chattel, as to his right to recover, where there is no plea in abatement. It would seem absurd, in such a case to join the other partners.

If there was fraud in the sale, I apprehend it would not have the effect of transferring the interest of Fetterly, so as to make Rose a tenant in common of the goods with Fox the other party, and thereby disable Fox from treating the vendee Rose as being wrongfully in possession of the goods. Where a partner, acting in the ordinary course of business, sells goods of the firm he does so by virtue of an understood general agency on behalf of the whole firm ; and if in the

particular facts of the transaction there is proof of a fraudulent collusion between him and the vendee, then I conceive nothing passes, because he must be known not to be then acting within the scope of his agency; and in such cases, I apprehend that the fraudulent sale has not the effect of passing the interest (whatever that may be) of the partner acting collusively, so as to constitute the vendee a tenant in common of the goods with his partners. We must always keep in mind the distinction between partners and those who are merely joint owners of a chattel. As regards partnerships, it is a general principle that there is a choice of persons to be exercised. One partner cannot intrude a stranger into the firm without the consent of the others; and further, each partner has a lien upon all the stock of the firm for the balance of the account, and none of the partners can be said to have a specific interest in any particular article. His interest is only his claim upon the partnership on a winding up of their affairs. If he could assume under this a right to sell to a stranger an undivided interest in the goods themselves, or in any certain portion of them, he would be rendering these principles of no value.

I do not find much in English authorities that bears directly upon this point, but more in American authorities, though not as conclusively laid down as one could desire. Mr. Collyer, in his treatise, however, in what he does say upon the subject, leads, I think, to the conclusion which I have expressed: I refer to his section 123 (note 2), 125, 196, 382, 383, 394, 669, 671, 672; 1189, 1216, *Kent's Com.* vol. iii. 37, note a; *Barton et al., v. Williams et al.*, 5 B. & Ald. 395.

My opinion is, that where the case is one of fraudulent collusion, the partner defrauded can sue the vendee in trover, and would not be embarrassed by the objection that at least the interest passed of the partner who made the sale; and so, that the vendee, being tenant in common of the chattel, would not be liable in trover, because he would have a right to the possession.

But there is really no ground for disturbing this verdict, which is rightly given for the value of the goods, which were

the sole property of the plaintiff, and which therefore, this partner could have no right to sell; for both my brother judges, who presided severally at the respective trials, are clear that there was nothing in the case which the plaintiff desired to prove, which could on his own shewing be taken as invalidating the sale of the partnership goods on the ground of fraudulent collusion between Fetterly and the vendee.

The plaintiff, it seems, insists that the sale was not binding upon him because his partner took upon himself to sell without the plaintiff's previous assent, and without the plaintiff's knowledge of his intention. But that surely is not so. Each partner can, as a general rule, dispose of the partnership property in satisfaction of a debt of the firm, or otherwise. The mere circumstance that he has not the assent of the other partners is no fraud. The evidence shewed that the firm were indebted to the defendant, and that Fetterly made the sale of the timber in question to him; and, though the sale was to a greater amount than the debt due, yet the learned judge reports that it was not pretended that the sale was not for a perfectly good consideration, or was intended in any way as a fraud upon the other partners, unless it be a fraud that Fox was not consulted.

If that be so, the verdict is right as it is, and it would be continuing litigation to no purpose to grant a new trial.

DRAPER, J.—The situation of Fetterly and Fox was that of partners, not of mere joint owners of chattel property. The power of sale, therefore, arising from the relation of co-partnership, clearly enabled either Fox or Fetterly to dispose of the co-partnership property. It appeared that the defendant was a creditor of the firm; the sale to him was made in satisfaction or security for his debt, and for advances to be made by him in order to pay other debts due by the firm. As I understand from the learned judge who tried the cause what the plaintiff insisted was, that because the sale was made without his consent and against his wish—as he desired to go on, while Fetterly, feeling their embarrassed state, desired to effect the best arrangement he could immediately—therefore the sale was fraudulent as against

him, and could not divest him of his right of ownership. The learned judge held the contrary, and that a sale made for the *bona fide* purpose of satisfying a creditor and providing funds to satisfy other creditors, was within the authority of one co-partner, and could not be deemed a fraud on the other; and I think the learned judge was right, and that this rule should be discharged.

BURNS, J.—On the first trial of this cause the jury found for the plaintiff, with damages 115*l.*, which included the value of the property that the plaintiff claimed as being his individual property, as well as a share of the partnership property which his partner had sold to the defendant. So far as regards my own opinion, when granting the new trial, it appeared to me that the plaintiff could not succeed in recovering a portion of the value of the timber sold by the plaintiff's partner to the defendant in an action of trover against the vendee. It appeared that the partnership was at the time of the sale to the defendant indebted to him, and the sale was in fact effected to discharge that debt, and the price given for the timber seemed to have been a fair price. It is true that the price paid by the defendant beyond the discharge of the debt was paid or accounted for to the partner of the plaintiff—the plaintiff, so far as appeared, not participating in the proceeds in any way; but that I take to be a matter between the partners themselves, and for which the defendant could not be made accountable. At the second trial, before myself, many of the facts gone into at the first trial were not proved, because the plaintiff's counsel rested his case upon the proposition, that admitting all that the defendant could urge respecting his having paid a fair price for the timber, and that at the time it was partly to satisfy the defendant's demand, yet that as the plaintiff and his partner were engaged in partnership, getting out the timber for the Quebec market, and while in the progress of doing so, before their work was perhaps half accomplished, even so far as the manufacture of the timber in the forest, the partner had no right to sell to the defendant, and that the sale could not deprive the plaintiff of his share of the property, the defendant being aware

for what purpose the partnership were manufacturing the timber; and that the defendant dealing with the partner alone, and paying him alone, it was a fraud on the plaintiff's rights; and under these circumstances he could maintain trover against this defendant, who was aware that he was dealing adversely to the plaintiff's rights for his share of the value of the timber. I could not adopt the plaintiff's view, for the reason, as it appeared to me, that there was a distinction between the position of part-owners of a chattel—which might be either a tenancy in common or a joint tenancy—and the case of partnership, in which the right of the two partners, though they were joint tenants, extended over the whole property; and the case not being one of such fraud in the defendant as permitted him to sue alone, no separate action could be maintained against the vendee by one partner for a share; and for this reason I rejected the plaintiff's evidence, and told the jury they were simply to consider the case as regarded the property claimed by the plaintiff to be his individual property.

I still think the view I took the correct one, and that to allow the plaintiff to recover under these circumstances, would be productive of great embarrassment to trade and commercial transactions, and would tend to make it necessary for every one dealing with firms to be first satisfied that the parties with whom the dealing took place had the authority or sanction of his co-partners to deal with the partnership property. So far as regards property held by a tenancy in common, it is incumbent on the purchaser to see that the seller can confer a title to the whole; and if he buys without the seller being clothed with the authority to deal with it, he becomes accountable to the owner in the proportion of value which by the title the owner had in the property. This is clearly established by the case of *Barton v. Williams*, 5 B. & Al. 395, affirmed in error, 3 Bing. 139. All the cases of part owners of property to be found proceed upon that principle. Nearly all the cases to be found upon the subject are collected in the two cases of *Farrar v. Beswick*, 1 M. & W. 682, and *Mayhew v. Herrick*, 7 C. B. 229. I am not prepared to say that the plaintiff might not, even

upon this sale by his partner to the defendant, have been enabled to maintain an action of trover against his own partner—but that is a very different question from sustaining an action against the vendee. In the ordinary transactions between partners, relative to the partnership property, one partner can maintain no action against the other, but the remedies against each other lie in equity; and there the accounts between them are all gone into, in order to ascertain their rights and proportions of the partnership property. Permitting an action of trover to be sustained by one partner against another, is an exception to the rule, and that exception is allowed upon the principle of the destruction of the property, or *quoad* the partner claiming such circumstances as amount to a destruction of his rights; and in such cases courts of law permit the one partner to sue the other, and recover such proportionate value of the article as may either be expressly proved, or such, as in the absence of proof, would be inferred. *Mayhew v. Herrick* was decided upon this principle. The action was against the officer of the Palace court, who had sold the whole of the property of the partnership, and the court held that the officer must, in such case, stand in the shoes of the partner against whom he had the execution; and therefore as to the half of the property, he was liable to the plaintiff. The question raised in the case before us is, whether the plaintiff can pursue any remedy against the defendant, who has become possessed of the property. The case of *Farrar v. Beswick* was decided upon the construction of the plea; but Parke, Baron, says, “As at present advised, though it is not necessary to give a conclusive opinion, I think that if the plea had stated that Joshua had a joint interest in these cattle, and that the sheriff seized and sold the whole goods to levy the execution, it would have been a good answer to the action.” This proposition was controverted in the argument of *Mayhew v. Herrick*, but not decided against. Maule, J., says, “It may be that the co-tenant may, if he think fit, follow the thing, and make title, notwithstanding its sale and delivery to a third party.” I can understand how this may possibly be applied to a joint tenancy—for

instance, in a horse—though still I think the difficulties are almost insuperable to pursuing the thing in the hands of the vendee; but I am at a loss altogether to apply it to the case of partnership property, which is a property so entirely indivisible in its nature, that it must be the case that each partner must have a right in him, not to be denied or questioned, to confer title upon a third person. I am now speaking of cases where the transfer is not a mere pretence. In the case before us the fraud complained of was that the one partner sold all the property, and put the money or proceeds in his own pocket. That, in my opinion, is not sufficient to enable the plaintiff to pursue the property into the hands of the vendee. We should, I think, hold to that which seems to me indispensable to the security and convenience of the public, as well as to the facility of transacting commercial business, and what was proposed in this case fell short of establishing an exception to the proposition.

Rule discharged.

WILLIAMS V. SQUAIR.

Arbitration—Sufficiency of—Damages awarded not recoverable in the cause—Verdict allowed to stand as security for—execution of award at same time and place not necessary when memorandum of award so signed.

Action for injury to a water course and mill privilege. At the trial “the cause and all matters in difference between the parties” were referred to certain arbitrators, who were specially authorized in the reference to determine the value of the property alleged to be injured, as well as to award damages.

A verdict was taken for 1,000l.; and it was agreed that the verdict should stand as security for the payment of such value, as well as for any damages that the arbitrators might award, and should be reduced or increased, according to the award.

At the conclusion of their inquiry, the arbitrators signed a minute of their decision, but the award itself was not executed until some days after, and was signed by the arbitrators separately and at different times. They awarded that the defendant was entitled to a verdict, and they assessed the damages in the cause at 500l., and ordered the verdict to be reduced to that sum.

Held, that under the terms of the reference the verdict might stand as security for any damages in the power of the arbitrators to award, and therefore for those given, though the arbitrators took into consideration injuries caused before the first day laid in the declaration, and which, perhaps, strictly, could not have been recovered for in the cause. (The award itself was clearly not bad on this ground).

Semble, that in the absence of any express agreement in the submission, it would be unnecessary to distinguish how much was awarded in respect of matters in difference in the cause, and how much for other matters.

Held also, that the arbitrators, having signed a memorandum of their judgment at the same time and place, might execute the more formal award separately and at different times, but within the time allowed.

This action was brought by the plaintiff in respect of an injury to a water-course and mill-privilege cause by the defendant; and, at the last assizes held at Cobourg, "*the cause and all matters in difference between the parties*," were referred to Henry S. Reid, Ebenezer Perry, and Nesbitt Kirchoffer, Esquires. The reference contained a special authority to the arbitrators to determine the value of the property for the injury to which the action had been brought as well as to award damages, if they found that any had been sustained by reason of the acts of the defendant. Further, that the arbitrators should have power to award and adjudge that the defendant should pay such value of the property at such time and times as they thought fit, and should have power to direct conveyance to be made of the property; and also to direct the defendant to give security for the payment of the value of the property, either by bond or mortgage or otherwise, together with allowance for interest. It was further agreed that the verdict (1000*l.*) should stand as a security for the payment of such value, *as well as for any damages that the arbitrators might award*; that the arbitrators should distinguish in the award how much was awarded for the value of the property, and how much for damages, if any; and that the verdict should be reduced or increased as the said arbitrators should award; and that all costs should abide the event.

In pursuance of this reference the arbitrators met on the 20th of May last, and continued their setting on that day and on the 21st, and examined from thirty to forty witnesses between the parties; and on the 21st they signed a minute of their award, but the award itself was not prepared or signed till some days after. The arbitrators signed and sealed their award, as by the date appeared, on the 7th of June, and thereby they awarded thus:—

First. That the plaintiff had good cause of action against

the defendant in the said cause; and they assessed and awarded the damages to be paid by the defendant to the plaintiff in the cause at the sum of 500*l.*, being the amount of damages that the plaintiff has sustained by the acts of the defendant, as complained of by the plaintiff in the cause; and the arbitrators directed the verdict to be reduced to that sum.

Secondly. That the property of the plaintiff mentioned in the reference was worth the sum of 1,100*l.*, to be paid for by the defendant in four equal annual instalments, of 275*l.* each, from the 21st May, 1852, with interest, such payments to be first applied towards the liquidation of any incumbrances which may exist upon the said property; and that the plaintiff do make a conveyance of the said property to the defendant within one month from the 21st day of May; and further that the defendant give to the plaintiff security for the payment of the said sum of 1,100*l.* upon the said property, as well as upon his, the defendant's, own oatmeal-mill and premises, adjoining said property.

Vankoughnet, Q. C., for the defendant, obtained a rule *nisi* to set aside the award, on the following grounds:

First. That the award is defective, the arbitrators not having thereby disposed of the several issues in the cause referred to them.

Secondly. That the award does not distinguish between the matters in difference in the cause, and the other matters referred to them.

Thirdly. That the arbitrators have fixed the amount of the verdict in this cause in respect of matters and causes of action not at issue in the said cause.

Fourthly. That the award does not direct what kind of security the defendant is to give for the purchase of the property therein referred to.

Fifthly. That the award is not final, and is uncertain.

Sixthly. For corruption and improper conduct in the arbitrators, in refusing to hear testimony produced and offered to them by the defendant, and in awarding an excessive sum.

Seventhly. Because the award was not properly executed

by the arbitrators, having been executed at different times, in different places, and on different days.

He cited as to the second and third objections. *Polkinhorn v. Wright*, 15 L. J. (Q.B.) 70; *Wyatt v. Curnell*, 1 Dowl. N. S. 327; *Gyde v. Boucher*, 5 Dowl. 129; *Randall v. Randall*, 7 East. 81; *Gray v. Gwennap*, 1 B. & Al. 106; *Tandy v. Tandy*, 9 Dowl. 1044; *Stone v. Phillips*, 4 Bing. N. C. 37; 1 Saund. 24, note 1.

As to the fourth objection, *Tipping v. Smith*, 2 Str. 1044; *Thinne v. Rigby*, Cro. Jac. 314.

As to the last point, *Stalworth v. Inns*, 13 M. & W. 466; 9 Jur. 285, S. C.; *Wright v. Graham*, 3 Ex. 131.

Cameron, Q. C., with whom was *J. B. Robinson*, shewed cause. They cited as to the second and third objections, *Bonner v. Charlton*, 5 East. 139; *Tayler v. Shuttleworth*, 6 Bing. N. C. 277; *Tayler v. Marling*, (S. C.) 2 M. & G. 55; *Wilcox v. Wilcox*, 4 Ex. 500; *Baker v. Cotterill*, 14 Jur. 1120; *Phillips v. Higgins*, 20 L. J. (Q. B.) 357; *Smith et al. v. Reece*, 14 Jur. 483.

As to the last point, *Little et al. v. Newton*, 9 Dowl. 437.

BURNS, J., delivered the judgment of the court.

The first objection was abandoned on the argument, in consequence of an agreement being entered into between the attorneys, that the arbitrators should be released from specific findings on the different issues. This agreement also disposes, to a certain extent, of any ground arising under the second objection—that for want of such separate finding, it cannot be ascertained whether the plaintiff would be entitled to the costs of the cause, because it is uncertain whether any sum for damages has been awarded in respect of the matters in difference in the cause. Whether such an objection be tenable in cases where a verdict is taken, seems to be much doubted in England; for the difficulty might, in respect of the costs, be removed by the party waiving them. The difficulty arises in actions of assumpsit, debt, and covenant, for a demand in the nature of a debt; and the scale at which the costs are taxed depends upon whether the plaintiff recovers, in respect to the cause of action, a sum exceeding 20*l.*—*Vide Spain v. Cadell*, 8 M. & W. 129;

Elleman v. Williams, 2 D. & L. 46; England v. Davison, 9 Dow. 1052; Morgan v. Smith, 1 Dow. N. S. 617; Rule v. Bryde, 1 Ex. 151. The more recent cases of Baker v. Cotterill, 14 Jur. 1120, before Mr. Justice Wightman, and In re Smith, 14 Jur. 483, before Mr. Justice Erle, seem to be much more reasonable than to hold to such strictness as we find was formerly the case. Where it can be reasonably inferred from the award that the cause of action has been disposed of, it ought to be so held; and whether the plaintiff be entitled to one scale or another of costs, the cases which may be cited upon that point have no application in this country, inasmuch as we do not allow costs on any graduated scale according to the amount recovered, as is done in England. Here the cause has been disposed of by ordering that the verdict be reduced; and though the amount at which the verdict is ordered to stand may consist in part of something outside the cause of action, yet if it be within the submission it is sufficiently certain and there can be no reason for distinguishing the amount into different sums, particularly when it is agreed that the verdict should stand as a security for any damages the arbitrators might award to the plaintiff.

So far as the grounds of the second objection, taken in conjunction with the third objection, are applicable to this case, they amount to this, that because the plaintiff's declaration stated a day on which the injury was alleged to have commenced, and that it was continued subsequent to that day, which was stated to be the 1st of January, 1850, therefore the plaintiff's cause of action was confined. The objection to the award is, that the arbitrators took into consideration injuries sustained by the plaintiff in 1843, 1844, 1845, and subsequent years, which were outside the action. The better opinion seems to be, that when the injury is laid to have taken place on a certain day, and on divers other days and times that the plaintiff is confined to one act before the first day. Mr. Starkie, in his work on Evidence, 1841, in the note, says, on this subject, "A very learned person has intimated a doubt whether any number of trespasses may not be given in evidence, all anterior to the day first named."

It is of little consequence, however, to inquire into the subject, for the terms of the reference certainly clothed the arbitrators with power to go behind the day first named; and the only question is, admitting they did so, whether the verdict can be used to enforce the award. That the award itself is not bad for joining such damages outside the action with those within it, is clearly established from the case of *Taylor v. Shuttleworth*, 6 Bing. N. C. 277, and reported by the name of *Taylor v. Marling*, 2 M. & G. 550. It is contended on the part of the defendant, that the verdict cannot stand as a security for any sum which may have been awarded upon matters outside the cause of action. That may be so in some cases, where there is nothing to indicate that the parties intend otherwise; but here the expression in the reference is, that the verdict shall stand as a security *for the payment of such value as well as for any damages that the said arbitrators may award*. This can have no other meaning than to cover such damages as it was in the power of the arbitrators to award, and their power extended to matters outside the cause as well as within it. It seems to be clear, and to leave no room for doubt, that the parties meant the verdict should stand as a security for such damages, when we see the power was given to increase the verdict beyond the thousand pounds.

The cases of *Prentice v. Reed*, 1 Taunt. 158, and *Gray v. Gwennap*, 1 B. & Al. 106, are both strong authorities upon this point to shew that even in the absence of such express agreement as we have upon the submission of the parties in this case, the court will not hold the award void for not distinguishing how much was awarded in respect of the matters in the cause, and how much in respect of the other matters in difference. In our own court the case of *Watson v. the Toronto Gas-light and Water Company*, 5 U. C. R. 523, has a strong bearing upon this case. There the award was for future and prospective demands for injuries, upon a reference, after verdict taken, which gave the arbitrators power to award a sum in full satisfaction of all past and future demands. In the case we have now to deal with it is reversed, and the demands outside the action are such

as existed anterior to the time laid in the declaration— Under such circumstances, it would seem less objectionable that the award should have named one sum for the whole injury which had been from time to time sustained, than in the other case to take into consideration what may be argued to be in some measure imaginary: though a substantial injury may, without doubt, cause future damage. It was however agreed in that case that the arbitrators should have that power, and it was held that it was not improperly exercised in blending the whole in one sum; and here the scope of the reference gave the power to the arbitrators to go behind the day named in the declaration, and having done so the same principle should govern, and this principle is fully borne out by the authorities.

No argument was pressed upon the fourth objection because it has been shown that the defendant declined to accept the property and pay for it. After the reference, and while the arbitrators were investigating the matters, the plaintiff entered into an agreement that the arbitrators might value the property apart from other matters, and he agreed that he would not compel the defendant to pay such value of the property, provided the defendant should, with forty-eight hours after the notice of the award, decline to comply with the valuation affixed by the arbitrators. The defendant had notice on the 21st of May, of how the arbitrators had disposed of the matters between the parties, and he promptly signified his intention not to comply by accepting the property, and paying the valuation. The plaintiff is not seeking to enforce that part of the award, and considers he is not entitled to it by reason of his agreement, and it is therefore to no purpose to inquire whether the objections could or could not be sustained. Besides, it seems to be separable from the rest; and if it were bad might not render the whole award bad.

The fifth objection is already answered by what has been said.

The sixth objection is clearly answered by the affidavits in reply. Jane's evidence was not rejected; but he himself appears to have declined giving testimony in con-

sequence of some understanding he had with the defendant about purchasing some part of the property, or entering into some arrangement with him. The defendant was present and heard what took place, and he must be held to have acquiesced in the evidence not being received ; and after his not insisting upon the evidence being received, but allowing the plaintiff and the arbitrators to suppose that they were to act without Mr. Jane's valuation, it is quite too late to make it a ground for setting aside the award. There is the less reason for entertaining the objection if it really did amount to an objection, when we see that his evidence applied only to the valuation of the property being that part of the award which the defendant declines to comply with. The defendant very well knew, before the arbitrators met, that the valuation of the property was submitted to them, and he should have been prepared to give them all the evidence he desired to do, or to have asked, if necessary, for further time to do so. Some thirty or forty witnesses had been examined, and it is scarcely possible to suppose that the defendant was not satisfied to let his case rest upon what had been proved without Jane's evidence.

The last ground is, that the award is bad because it has been signed at different times and places by the arbitrators. This point was raised in *Little v. Newton* 2 M. & G. 351, but the Court of Common Pleas hesitated to hold the award void on that ground. The Court of Exchequer, in two cases since, *Stalworth v. Inns*, 13 M. & W. 466, and 9 Jur. 285, and *Wright v. Graham*, 3 Ex. 131, expressed a strong opinion against the award, but declined to decide, leaving the party to his action on the award, as the question was considered too nice to determine, except in such a way that there might be an appeal if necessary. In this case we are relieved, we think, from pronouncing an opinion upon a point about which one court hesitated and another court was rather inclined to take a strong view adverse to the award, when it is shewn to us that in fact the arbitrators did, after they had heard all the evidence and deliberated upon it, make up their minds, and reduced

the heads of the award to writing and all the three arbitrators signed in the memorandum. This they did on the 21st May, and the formal award drawn out *in extenso* only embodies the memorandum in legal terms and phraseology. The parties were made aware of the award on the 21st of May, by copies of the memorandum being delivered to the plaintiff and the defendant respectively. The more formal award was signed, it is true, by the arbitrators at different times and places, but within the time given them by the submission. The difference between this case and those cited is, that in the cited cases it did not appear but that there was or might be an opinion or judgment still to be given upon some of the submitted matters, or that a meeting was to take place for the purpose of signing the award. Here everything was adjudged upon, and actually signed by the arbitrators on the 21st May, and there was no further exercise of opinion or judgment to take place, nor does it appear that the arbitrators were again to meet. Under these circumstances we think it was competent to have the formal judgment prepared and signed by the different arbitrators, without forcing them to come together again merely for the purpose of signing and sealing the same. Nothing remained to be done but signing and affixing the seal to the formal instrument, and we see no objection to that being done by the arbitrators separately.

For these reasons we think the award sufficient, and that the verdict should stand, and that the defendant's rule should be discharged with costs.

Rule discharged.

TILLY v. FISHER.

Trover for promissory notes not in defendant's possession, and not shewn to have been lost or destroyed—Secondary evidence admissible.

Trover for promissory notes. The plaintiff's counsel in opening the case stated that the notes were left by the plaintiff with the defendant as security, and they had been given up by him to the makers improperly before any demand on the defendant, or refused on his part to return them.

Held, that no notice to the defendant to produce was necessary; and Draper, J., *dissentiente* that the plaintiff was entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence.

Trover for two promissory notes, each being described as

a note "made by one A. M. Taggart and one E. F. Moore, for the sum therein mentioned, payable to one Andrew Gage, or bearer, at a certain time therein mentioned, and now past," with an averment that they were assigned by Gage to the plaintiff, and were of great value, viz., 150*l*.

Pleas—1. Not guilty.

2. The plaintiff not possessed of the said goods and chattels in the declaration mentioned, or either of them, as of his own property.

At the trial, before McLean, J., at Hamilton, the plaintiff appeared as a witness, and swore that the defendant, being a justice of the peace, had convicted him of selling spirituous liquours without license, and had fined him 5*l*. and costs: that a bailiff having seized his goods in consequence, he interceded for delay: that he had two promissory notes made by Moore and Taggart, and he was proceeding to describe them, when the defendants counsel objected that he could give no oral evidence of the contents of the notes: that the plaintiff's counsel, in stating the case to the jury, had asserted that the defendant had given up the notes to the makers improperly—they being deposited with him by the plaintiff as security: that search should have been made with the makers for them, or they should have been subpœnaed to produce them, no proof being given of their being lost or destroyed.

The plaintiff's counsel admitted that the notes had been disposed of by the defendant to the makers before any demand on the defendant, or refusal on his part to return them: that he could not shew them to have been lost or cancelled: and that he had not subpœnaed the holders to produce them.

The learned judge thereupon nonsuited the plaintiff reserving leave to move to set the nonsuit aside.

Burton obtained a rule *nisi* accordingly, or for a new trial on payment of costs. *Freeman* shewed cause.

The cases cited are referred to in the judgment of the court.

ROBINSON, C. J.—The inference I draw from the cases decided, and the language of the judges, especially in *Bucher*

et al. v. Jarret, 3 B. & P. 143; Rex v. Aickles, 1 Leache's Cr. Ca. 394; Whitehead v. Scott, 1 Moo. & Rob. 2; Scott v. Jodes, 4 Taunton 865; Starkie on Evidence, 3rd ed. 1. 403, is not merely that notice to produce need not in such cases be given to the defendant, but that secondary evidence may be given of the contents of the deed or paper without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence.

I find no warrant for the distinction, that because the plaintiff knew or may have known that the instrument was no longer in the defendant's possession, who might therefore produce it in order to correct any misstatement of its contents, he was bound to endeavor to trace it, and produce it to the court, or to account for it. Indeed, Aickle's case is opposed to such a distinction, for there the bill charged to have been stolen had been passed away by the prisoner to a third party, in whose possession it had been seen a few days before the trial, and yet the prosecutor was allowed to give parol evidence of its contents.

DRAPER, J.—It would be a much easier thing tacitly to acquiesce in the judgment just pronounced than to endeavour to establish an opposite conclusion, particularly as I cannot but distrust my own opinion when I find my learned brothers concur; but, with every desire to concur in their judgment (for I always feel it a matter to be regretted, and if possible to be avoided, that we should not be unanimous), I cannot depart from the opinion expressed by me at the trial, and which I shall briefly endeavour to maintain.

In actions of trover for, or other *torts* relative to deeds, bonds, promissory notes, &c., the first question which presented itself was, whether the plaintiff might give parol evidence of its identity without giving notice to the defendant to produce the instrument itself; and in Cowan v. Abrahams, 1 Esp. 50, Lord Kenyon held that such notice was necessary. This doctrine was, however, soon overruled. First, in Bucher v. Jarrat, 3 B. & P. 143, where Lord Alvanley admitted secondary evidence of the certificate of a ship's registry, without notice to produce the certificate, the action

being in trover for the certificate. It is observable, however, that Lord Alvanley takes pains to distinguish that case from *Cowan v. Abrahams*; and Rook, J., states the rule of law to be, that "where a written instrument is to be used as a medium of proof by which a claim to a demand arising out of the instrument is to be supported," the instrument must be produced, or notice given to the defendant to produce it. In that case the defendant had the certificate in his possession. Then came the case of *Jolley v. Taylor*, 1 Camp. 143, which was assumpsit against the proprietor of a stage coach on a promise to carry three promissory notes for 5*l.* each. It was objected that the plaintiff could not go into the evidence of the contents of the notes without giving notice to the defendant to produce them. Sir James Mansfield held the notice unnecessary, saying, "I can make no distinction as to this purpose between written instruments and other articles—between trover for a promissory note and trover for a waggon and horses." I take the words "for this purpose," to mean for the purpose of identifying the instruments, the possession of which was traced to the defendant, and which, for all that appeared, he still held.

Aickle's case was not decided on the point of notice, for the bill was not in the prisoner's possession. It was in the hands of a third party, who had been served with a *subpœna duces tecum*, but who did not appear. The prisoner's counsel objected, that notwithstanding this, parol testimony of its contents was inadmissible; to which the counsel for the crown answered, that after the *subpœna* served on the party holding it they were in a position to give the next best evidence of it. The parol testimony was held to have been rightly received. *How v. Hall*, 14 East. 274, goes further than the preceding cases. It was trover for a bond. The argument of the defendant's counsel is, that the party shall give the best evidence which the nature of the thing will admit of, and *that*, in the case of written instruments, is the instrument itself, unless where it is in the hands of the adverse party, and then notice to produce must be given before parol testimony will be admitted. The whole judgment goes to the single point, that in trover for a

written instrument in the defendant's possession such notice is unnecessary. Lord Ellenborough says, "The plaintiff is to shew as well as he can, what the instrument is that he seeks to recover as his own from the possession of the defendant; and if he give a *wrong description of it, the defendant may set it right by producing the thing*. What further notice can be necessary to shew that the plaintiff means to *charge the defendant with having possession of the instrument than the declaration itself?*" *Whitehead v. Scott*, 1 M. & Rob. 2, is precisely similar, and *Wood v. Strickland*, 2 Mer. 461, confirms the doctrine.

I think the case in judgment clearly distinguishable, and that it does not fall within the principle of the foregoing decisions. The plaintiff's counsel opened—that the defendant was not in possession of the note; that in fact he had parted with the possession of it wrongfully, and it was this very disposition of it that formed the conversion on which it was intended to rely. To have given notice to produce under these circumstances, would have been idle and unavailing; for notice to produce implies the assertion that the party to whom such notice is given has possession of the instrument. As I understand the foregoing cases, they are all founded on the same implied assertion, and therefore the parol evidence was held admissible. But I cannot find in these cases any authority for what is now contended for—viz., that in trover for a written instrument parol evidence may be given of its contents, although it is not in the defendant's possession, and that fact was well known to the plaintiff. None of the reasonings of the cases that I have seen justifies such a conclusion. Another exception to this general rule of the non-admissibility of secondary evidence is, where the document is in the hands of a third party *who is not compellable by law to produce it, and who refuses to do so either when summoned as a witness with a sub. duc. tec., or when sworn as a witness in court without such subpoena, if he admits he has the document*. The reason is, that the party offering secondary evidence has done all in his power to produce the original instrument.

Hibberd v. Knight, 2 Ex. 11, and the cases there cited

shew the necessity of a *subpœna duces tecum* to the party holding the instrument, and the latter case shews that if the *subpœna duces tecum* has not been served in proper time secondary evidence is not admissable.

I take the law to be, that if these promissory notes had not been shewn to be out of the defendant's possession, and in the possession of another party, and that the plaintiff who delivered them to the defendant knew before the trial that the defendant had parted with the possession of them, the plaintiff might have given secondary evidence of their contents without giving notice to produce; but that on the facts appearing it was necessary for him to serve the party into whose hands they were traced with a *subpœna duces tecum* before secondary evidence was admissible, and therefore the nonsuit was right.

I think there should be a new trial on payment of costs.

BURNS, J., concurred in opinion with the Chief Justice.

Per Cur.—Rule absolute to set aside the nonsuit.

McKECHNIE ET AL. V. McKEYES.

Obstruction of water course—Denial of right to natural flow of the water, evidence under—Plea of prescriptive right to obstruct the water to any extent necessary for working mills, not supported by the evidence—Questions arising under such plea—Presumption of grant—Effect and object of Prescription Act—Amendment refused.

Case for obstruction of water-course. The declaration stated that the plaintiffs were lawfully possessed of a certain close, together with a wool-len mill and manufactory, upon a certain water-course, and were entitled to have the said water-course flow, in its usual and proper course, to their mill, to supply the same with water; and they complained that the defendant had wrongfully penned back the water, and prevented it from running in its natural course to their close and mill.

The defendant pleaded, 3rd, denying the right of the plaintiffs to the natural flow of the stream,

6th—A plea of prescription, setting forth, that more than twenty years before the suit—viz., in 1820, and until 1838—there was a saw-mill on the stream; that in 1838 it was removed, and a clover-mill erected in its place, which last mentioned mill was removed in 1846, and within a year from its removal, a grist-mill was put up; that the occupiers of these several mills, for twenty years before the commencement of this suit, enjoyed the right, without interruption, of keeping back the water to such an extent, and for such a time, as was necessary to enable the occupiers, for the time being, of the said mills, to make full use of the said water, for beneficially using the said mills respectively; and that, to enable them so to use the said mills, it was not at any time necessary for the occupiers thereof to, nor did the defendant keep or continue set up or closed any mill-dams, &c., across the said stream, to obstruct the water to any greater extent, or for any longer time, than had theretofore, during the existence of the said mills so destroyed and removed as aforesaid, been necessary for beneficially working and using the same: that, before

and at the time when, &c., the defendant was the occupier of the grist mill last aforesaid, and in order to enable him to make use of the water for working the same, it became necessary for him to, and he did keep up and close the said mill-dam, and thereby necessarily obstructed the water to *and for such and no greater extent and time than was necessary* to enable him beneficially to use his mill—*quæ sunt eadem*, &c. The plaintiffs joined issue on the third plea, and traversed the averments in the sixth.

Held, That the third plea only put in issue the alleged natural right of the plaintiffs, by reason of the possession, as alleged in the declaration; and that no evidence was admissible under it to shew that such general right had been lost by reason of any conflicting right acquired, on any special ground, by the defendant.

As to the sixth plea—1st. That it must be considered as a plea of prescriptive right under the act 10 & 11 Vic. ch. 5; and, therefore, that the enjoyment must be for twenty years next before the commencement of the suit. How the enjoyment for twenty years, not carried up to the time of the action, might have availed as a foundation for presuming a grant, independently of the statute, could not be considered under the pleadings; though, *semble*, that the evidence given would have been insufficient for that purpose.

2nd. That whether a year did or did not elapse after the saw-mill was removed before the clover-mill was worked by water was immaterial, for the interruption intended by the statute is an adverse interference with the enjoyment, not a voluntary abstaining from user by the defendant.

3rd. That the only question under the evidence, was whether the enjoyment of the alleged easement, such as was shewn between 1849 and 1836, was sufficient to support the plea that, with regard to this, the point to be considered was, to what extent had the defendant enjoyed the privilege of obstructing the water for twenty years? not to what height the dam had been kept up—*i. e.*, to what extent he had *prepared means* for such obstruction.

4th. That the evidence in this case—which shewed, that while the clover-mill was in existence (from 1839 to 1846) the stream was used only for one or two months in the year, at a time when the water was high, and when, for all that appeared, such user occasioned no injury or detention—would not support the defence of prescriptive right to the extent pleaded.

The court, under the circumstances of this case—the pleadings having been before them on demurrer—refused a new trial with a view to an amendment of the pleadings.

The plaintiffs have a large woollen factory near Lake Ontario, in the township of Hamilton, upon a small stream which runs into the lake. And they complained of the defendant having, during the last summer, wrongfully and unlawfully penned back the water, and prevented it from running in its natural course to their close and mill.

The declaration stated, that the plaintiffs before and at the time when, &c., were lawfully possessed of a certain close, together with a woollen-mill and manufactory, then near to and upon a certain water-course, &c.; and that before and at the time of committing the grievances the plaintiffs of right ought to have had and enjoyed, and still

of right ought to have and enjoyed the benefit and advantage of the water of the said water-course, which had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow, in great plenty, and in its usual and proper course, into the plaintiffs' manufactory, close and premises, for supplying the same with water, &c., and for other necessary and useful purposes; that the defendant before and at the time when, &c., was and is possessed of a mill-dam and gates, hatches and erections, on and across a branch or tributary of the said water-course above the plaintiffs' premises; and that the defendant, intending to injure the plaintiffs, on the 1st of May 1851, and on divers other days, &c., wrongfully and injuriously kept and continued the said dam, gates, &c., for a long space of time set up, closed and shut—to wit, from thence to the commencement of this suit—and thereby obstructed the water, and prevented it from flowing to the plaintiffs' factory, close, and premises, in its usual and proper course, flow, and current; by means whereof the plaintiffs were prevented from using their manufactory, close and premises in so beneficial a manner as they otherwise would have done, &c.

The defendant pleaded—1st, Not guilty.

2nd, That the plaintiffs were not lawfully possessed of a certain close, together with a woollen mill and manufactory thereon, &c., in manner and form, &c.

3rd, That the plaintiffs ought not, at any or either of the said times when, &c., to have had and enjoyed, nor ought still to have and enjoy the advantage of the water of the said water-course as aforesaid, nor ought the water of the said stream or water-course, so obstructed and penned back as in the declaration mentioned, of right to have run or flowed, nor ought the same to run or flow in its usual and proper course, flow, and current, to the said woollen-mill, manufactory, close and premises of the plaintiffs, in manner and form, &c.

4th, Leave and license of the plaintiffs.

5th, A special plea, demurred to—on which the plaintiffs have judgment, reported in 9 U. C. R. 563.

6th, A plea of prescription, setting forth that more than twenty years next before this suit—viz., on the 1st of January, 1820, and from thence to the removal and destruction thereof, as herein mentioned—there existed, adjoining the said branch or tributary stream, a certain saw-mill on a certain close, being lot, &c., in the township of Hamilton; and that heretofore—to wit, on the 1st of December, 1838, the said mill was destroyed, removed and carried away by the then occupier thereof, for the purpose of erecting the mill hereinafter named; that another mill—to wit, a clover mill—shortly after, and within a year from the destruction and removal aforesaid, being on the day and year last aforesaid, was erected in the place of the said mill so destroyed, &c., which said last mentioned mill was also destroyed and removed by the then occupier thereof—viz., on the 1st of January, 1846—for the purpose of erecting the mill hereinafter mentioned; that a grist-mill shortly after, and within a year from the destruction and removal last aforesaid, on the day and year last aforesaid, was erected in the place of the last-mentioned mill. And that the occupiers of these several mills for the time being, for twenty years next before the commencement of this suit, enjoyed as of right, and without interruption, the right of, from time to time as occasion required, keeping and continuing set up, closed and shut, certain mill-dams, gates, hatches and other erections, in, upon, and across the said branch or stream, and thereby to obstruct, pen back, and stop the water thereof, *to such an extent and for such a time as was necessary to enable the occupiers for the time being of the said mills respectively to make full, proper and beneficial use of the said water for beneficially working and using the said mills respectively.* And the defendant averred, that to enable the occupiers for the time being, of the said mills so erected as aforesaid, to make full, proper, and beneficial use of the said water, for the purpose of beneficially working and using the said mills, it was not at any time necessary for the occupiers thereof to, *nor did the defendant keep or continue set up, closed, or shut, any mill-dams, gates, or hatches, or other erections, upon, or*

across the said stream, to obstruct the water to any greater extent, or for any longer time than had theretofore, during the existence of the said mills so destroyed and removed as aforesaid, been necessary for beneficially working and using the same: that before and at the times, &c., he (the defendant) was the occupier of the said grist-mill so erected as last aforesaid, and at the several times when, &c., it became necessary to keep and continue set up, closed, and shut, the mill-dam, gates, hatches, &c., in the declaration mentioned, and thereby then to obstruct the water, in order to enable the defendant to make full, proper, and beneficial use of the said water for beneficially working and using the said mill; wherefore the defendant, at the said times when, &c., did keep and continue set up, closed, and shut, the said mill dam, &c., and thereby necessarily obstructed the water to and for such and no greater extent and time than was necessary to enable the defendant to make full, proper, and beneficial use of the said water for working and using the said mill, as he lawfully might, which are the said supposed grievances, &c.

The plaintiff joined issue on the first, second, and third pleas; traversed the license in the fourth plea by the general replication *de injuria*; and to the sixth plea replied, "that for the full period of twenty years next before the commencement of this suit the defendant and the said occupiers for the time being of the said several mills, or any or either of them, did not have or enjoy as of right and without interruption the right of from time to time, as occasion required, keeping and continuing set up, closed and shut certain mill-dams, &c., upon and across the said branch or stream, and thereby obstructing, &c., the water to such an extent and for such times as in that plea mentioned," and concluded to the country.

At the trial, before Robinson, C. J., at Cobourg, in October last, the plaintiffs proved that in August preceding, finding the supply of water very deficient at their cloth mills, which are situated on the main stream, not far from its mouth, they sent their foremen to ascertain the cause. For three weeks the water at their works had been unusu-

ally low, so that they had been obliged to discharge several men, being unable to employ them. Their foreman first went up the main stream, called Perry's Creek, and found that there was no obstruction there; the water was allowed to flow freely past the mills above. He went from thence to the branch or tributary stream, on which is the dam in question in this cause, and examined first how the water was at one Lent's, who has a mill on that stream next above the defendant's mill. He found the pond there quite low, and saw that the water was not stopped at that point. He went from thence to the defendant's grist-mill, lower down, and found his pond full, and the water beginning to run over the waste-weir, while below the dam the bed of the stream was almost dry, shewing that he had been keeping back the water to fill his pond. His gates were shut, and no one but a boy there; the mill not going. He found the defendant, and remonstrated with him for keeping back the water from those below. The defendant said it was not he but Lent who had kept it back. The foreman told him it was not so, for he had just come from Lent's. The defendant then said he had worked his mill every day for an hour or two, and admitted that when his pond ran off he had shut his gates and let it fill for the next day. He said he could not avoid doing this; and when told that Lent, his neighbor above, acted differently, and let the water flow past freely, he said his grist mill was a different affair from Lent's mill; that he had other rights than a common water privilege, and must let his mill go when the public desired it.

It was proved also that before this time—viz., in 1849—one of the plaintiffs had gone to the defendant to complain of his penning the water back; that he denied that he had done so, and said he had ground all the time; that Lent's pond was larger than his, and that it was he who had stopped the water. He did not seem then to set up any right to stop the water, but denied that he had done it, and threw the blame on Lent.

Lent was examined as a witness, and swore that he had himself a dam across this stream since 1829; that his dam

is longer than the defendant's, and the pond larger, though his dam is not so high; that he had often talked with the defendant about his right to the water, and that the defendant had always maintained that no man had a right to keep back the water, and therefore that Lent should not do it.

It was proved that this small stream had not more than one-third as much water as the main stream, called Perry's Branch, on which the plaintiffs' works are; that in a dry season it fails more than the main stream does; and that there is usually much less water in it at present than there was many years ago when the country was less cleared. During the time of the obstruction complained of—that is in the summer of 1851—the water was very low generally.

This was the substance of the plaintiffs' evidence. Damages were not pressed, the action being avowedly brought to try the right.

The defendant endeavoured to support his pleas, or some of them relying upon being able to shew that he and those from whom he derived title, had enjoyed for twenty years next before action brought the privilege of keeping back the water to such an extent and for such a time as was necessary to enable them respectively to make proper and beneficial use of the water for working their respective mills; and that to enable the occupiers for the time being of the mills so erected to make full, proper, and beneficial use of the water for such purposes, it was not at any time necessary for them to, nor did the defendant keep or continue set up, closed, or shut, any dams, gates, &c., to stop the water to any greater extent or for any longer time than had theretofore during the existence of the said mills been necessary for beneficially working and using the same." His evidence was to the following effect:

Somewhere about the year 1817, the defendant's father put up a saw mill on the stream, and erected a dam, for giving him a head of water. It was a short dam, the stream being small and had been continued up to the time of the trial. It was the obstruction occasioned by it that was complained of in this action. To drive the saw-mill

first erected required as great a head of water as the defendant's grist-mill; and some of the witnesses declared that the water was kept up higher for the saw-mill than it had since been for the grist-mill, the escape for the water from the pond being then larger, and set lower. The dam was composed chiefly of earth and turf, and was used as a road for crossing the stream. Both ends, the witnesses stated, were yet parts of the original dam, though the middle portion had been at times carried away by freshets, and renewed. The saw-mill seemed to have been used and enjoying the same head of water from 1817, when it was erected without other cessation than occasionally from want of logs to saw, or temporary breaches in the dam from freshets, till July 1839, when the saw-mill and part of the dam were carried away by a flood, being at that time in the possession of this defendant. If that were so—and it was not disproved, though sworn to by several witnesses—then up to that time there had been an enjoyment without interruption of the privilege of backing the water to as great an extent as the defendant claimed a right to do for more than twenty years, though that would not be twenty years, “next before this action.”

But it was upon what took place after 1839 that the case turned at the trial with reference to the pleadings. Before the saw-mill was destroyed in 1839, the defendant had put up in his barn a small machine of some kind for threshing out clover seed, and cleaning it, which he called a clover-mill. It was worked by a horse. The saw-mill being carried away, the defendant, afterwards, but at what time could not be gathered from the evidence with any certainty, put up a small building to receive this clover-mill, so that it might be driven by water power. The stream was allowed to run without obstruction till the defendant began to use this clover-mill and whether that was within a year, or not until a longer period than a year had elapsed from the mill and dam being swept away, was a point much contested at the trial, and upon which the witness, a brother of the defendant, who was chiefly relied on by him for proving that there was not a non-user of the stream for a year, gave

the most confused and unsatisfactory evidence, sometimes stating the period at more, and sometimes less, according as he was pressed on one side or the other.

The clover-mill stood for some few years—some witnesses said two or three years, others seven or eight—and was used by the defendant only, or chiefly, as it seemed, for the purposes of his own farm, till he took it down, when he built his present grist-mill on the same site, which was five or six years ago. While the clover-mill stood, it was only used at times in the winter and early in the spring, never in summer. It was not going more than one month or two in the year, and was only once or twice used so late in the season as April; and from April, or usually from March, the stream would continue unobstructed till the following winter.

One witness was more precise than the others as to the time when the clover-mill was replaced by the present grist-mill. The grist-mill he said was built in 1846, and the clover-mill taken down in 1845.

It appeared from the evidence to be the general impression of the witnesses, that while the saw-mill was used the water was obstructed even to a greater degree by the dam and the arrangement of the gates, than the obstruction complained of for the purpose of the grist-mill; and it seemed also from the evidence, that, whether it was necessary or not for the working of the clover machine, the dam was kept up to the same height that it had been in the time of the saw-mill; the same pond being used, and no change shewn to have been made in the gates or flume; but on that point there was really scarcely any evidence, the witnesses all seeming to speak of the comparative height of water in the time of the saw-mill being used, and of the present grist-mill. But there was no doubt that the actual obstruction of the flow of the water between 1839, when the saw-mill was taken down, and 1846, when the grist-mill was built, was comparatively trifling, probably not occurring at all from March or April to the following December in any year, nor occasioning much if any injury or interruption, even while the clover-mill was being used.

At the conclusion of the evidence it was objected by the plaintiff's counsel that the sixth plea was not proved, for that it appeared that there was an interruption of the user for more than a year after the saw-mill was swept away in 1839.

And secondly, that when the use of the water was resumed for the purpose of the clover-mill it was not a user to the same extent; for that even if the water had been for the purpose of that small machine at any time kept up to the height that it had been, or is now, yet that it was only for a month or two, at a season when the streams are usually high, and when the dam would occasion no detention of the water, as the pond would soon fill, and the water run over, and get to the mills below; and besides while the clover-machine was going, the water would be flowing past, and there could be no occasion at that season to stop and hold back the water in order to gain a head.

On the defendant's side, it was contended that the evidence did not shew the interval of a year between the saw-mill and dam being swept away and the restoration of the dam for the purpose of the clover-mill. And 2ndly, that it makes no difference as to acquiring a prospective right, that the clover-mill was not in fact used or required to be used except for a small portion of each year—the only question being about the height of the dam.

The learned Chief Justice directed the jury that in order to entitle the plaintiffs to their action in the first instance they had only to shew that the defendant had hindered water from flowing to their mill by the stream which would otherwise have come to it, and that this had occurred at a time when the plaintiffs' mill had not a sufficient supply of water; that this had been shewn very clearly, and therefore it all turned on the defendant's right by prescription to take the liberty with the water which he had done. He held that the plaintiffs were entitled to succeed on the first four pleas, for that as to the third pleas it only put in issue the alleged natural right of the plaintiffs by reason of the position in which they represented themselves as standing, and did not open the way to evidence that such general right had

been lost by reason of a conflicting right acquired on any special ground by the defendant.

As to the 6th plea—he told the jury, that if there had been a year's interval and more between the stopping up of the water for the purposes of the saw-mill, and the obstructing it for the next purpose to which it was applied, then the sixth plea could not be held to be proved, whatever might otherwise be the legal effect of the interruption in preventing prescriptive right from being acquired; that whether there had or had not been a year's non-user within twenty years before the action brought, was not clear on the evidence, for that the testimony of the witness who spoke to that point was so contradictory and vacillating that no confidence could be placed in it; and that the main question was, whether there had been within the twenty years next before this action, a greater use made of the water—or rather, whether in August last that was the case—than had been made throughout that period—that is a use not supported by twenty years uninterrupted user previously. He told the jury that it did not seem to be proved that the present dam was higher or the obstruction greater than the saw-mill had occasioned from 1817 to 1839; but that from that time till the grist-mill was built—that is, for five or six years—the user had not been for so great a time, and to the same extent as during other parts of the twenty years; for that two or three months' work in the clover mill in winter and spring, without ever obstructing the water in summer, was by no means the same thing as keeping back the water all the year round; and that his impression was that the evidence given did not support the sixth plea.

The defendant's counsel contended that the defendant was entitled by the evidence to a verdict on the third plea, but it was held otherwise, as already stated.

The jury gave their verdict for the plaintiffs, stating at the same time that they could not say from the evidence whether there had been an interruption in the user for more than a year after the removal of the saw-mill or not.

Vankoughnet, Q. C., obtained a rule nisi for a new trial on the law and evidence, and for misdirection, and on

affidavits; and on the part of the plaintiffs also affidavits were filed. He cited *Peter v. Daniel*, 5 C. B. 568; *Bright v. Walker*, 1 Cr. M. & R. 219; *Saunders v. Newman*, 1 B. & Al. 258; *Hale v. Oldroyd*, 14 M. & W. 789.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

There is nothing in our Prescription Act 10 & 11 Vic. ch. 5, differing from the provisions of the imperial statute 2 & 3 Wm. IV., ch. 71, on any point that can effect this case. Our statute adopts the enactments and language of that statute closely in all that has any bearing on this action.

Then as to the defendant's right to a verdict on the third plea:—I think it clear that that point is against him, for in this action the plaintiffs have not in their declaration confined their alleged right to the ground of their being in possession of a mill or manufactory; they are not setting up a right to any peculiar use of the water which would require a deviation from the natural flow of the stream, as in *Frankum v. Lord Falmouth*, 6 C. & P. 529. If they were then they would stand on the same ground as a plaintiff suing for an injury to his lights, which he has a right to enjoy without obstruction, unless they are ancient lights; or as a plaintiff suing a defendant for stopping up or diverting a ditch running through the defendant's own land, but which the plaintiff claims a right by reason of long enjoyment of the easement to have flow unobstructed through the defendant's land, and affording a passage for the water from the plaintiff's land. In either of such cases a plea denying the plaintiff's right would put the plaintiff to proof of a particular foundation of the right which he is claiming, and in his endeavour to establish it, he would of course be liable to be met, under the issue upon such a plea, by any evidence shewing a right in the defendant inconsistent with and subversive of the right which the plaintiff would be claiming. But in this case the plaintiffs claim as proprietors of a certain close with a mill upon it, near to and upon a stream of water, and they claim only the right, which is a natural right, of having the water flow in its usual and

proper course to their close and premises, as well as to their mill, for supplying the same with water "for all useful and necessary purposes;" and the damage, they allege, is not only to their mill, but to their close and premises. The defendant in his third plea denies the plaintiff's right to have "the water flow in its usual and proper course to their mill, close, and premises." Upon such an issue the plaintiffs have no particular proof to give. They are under no necessity of shewing the acquisition of any particular privilege; but the defendant in this case seeks to repel the natural right, which by law follows the plaintiff's possession of their close on the bank of the stream, by setting up a title in himself by prescription. That, however, I have no doubt requires to be specially pleaded, and it was in order to let in such defence that the defendant pleaded his 5th and 6th pleas, on the latter of which this case turns—the former having been demurred to.

Now, as regards the sixth plea, and the effect of the evidence taken, as it must be, in reference to it, and not to any other plea which might have been pleaded, and which might have presented the question of a right required by prescription in a different form—the defendant has evidently pleaded this plea for the purpose of bringing himself within our Prescription Act, 10 & 11 Vic. ch. 5, and so relieving himself from any disadvantage which might arise from the plaintiff's being able to shew the commencement of the defendant's alleged right, and that it was within legal memory. He must make out then such a case as he has pleaded, and we must apply the evidence to the period of the twenty years next before the commencement of this action, and see how it supports the plea. The 2nd, 4th and 6th sections are those which apply to this case.

The judgment of the Court of Exchequer in England, in *Onley v. Gardiner*, 4 M. & W. 496, determines that, in order to entitle the defendant to the benefit of the statutory plea, he must shew an enjoyment of the easement as of right (that is, without leave obtained) for a continuous period of twenty years next before the suit, without such interruption for a year or more as is defined in the act.

The defendant in this plea is replying on a prescriptive right, and the defence must be considered in that point of view, and not with reference to the possible sufficiency of the evidence to support the presumption of a grant. I refer on that point to what is said by Littledale, J., in *Blewett v. Tregonning*, 3 Ad. & Ell. 554.

And this applies to the fact in this case—that there was, as the evidence seemed to shew, a period of more than twenty years—viz., from 1817 to 1839, during which the defendant and those under whom he claims kept up the dam to as a great height, and obstructed the water to as great an extent, as he has lately done. That would not support a plea of prescription, which this is. It would not have done so before the statute, because the commencement of the enjoyment—viz., in 1817—which is a modern period, was shewn; and it cannot now do so under the statute, unless the enjoyment was uninterrupted and continued through the twenty years, *next before the action brought*. How far it might have availed independently of the statute, as a foundation for presuming a grant, is a question which we are not at liberty to entertain on these pleadings.

Then, taking this, as we must do as a plea under the Prescription Act, there is but one question in the case, I think, and that is, whether the enjoyment of the alleged easement, such as was shewn between 1839 and 1846, when the clover-mill was used only, and the water detained but for a month or two in the winter, was an enjoyment of such an easement as will support the plea under the evidence; because, if not, then the proof failed as regards a great portion of the twenty years which are in question under this plea.

The contest at the trial upon the point whether a year did or did not elapse after the saw-mill was down before the clover-mill was worked by water, was of no moment; and it is of no consequence that the jury could not, as they said, make up their minds upon it from the contradiction in the evidence, for that was no interruption within the meaning of the statute, being no interference with the enjoyment by the owner of the land below, but nothing more than a voluntary abstaining from user by the defendant.

Now on the main point in the case—that is, whether the kind of user that was shewn from 1839 to 1846 was sufficient to support the claim to the easement to the extent required—we are not considering the question whether, if the defendant had acquired a right to the easement before 1839, what occurred afterwards would shew an abandonment of the easement. We are considering whether the evidence shewed a good foundation for a prescriptive right under the statute to the extent which it was necessary to carry it, in order to justify the detention complained of as being caused by the defendant in August, 1851.

If we were looking upon the evidence with a view to see whether the user enjoyed between 1839 and 1846 for the occasional use of the clover-mill was of such a kind as would support the presumption of a grant of privilege to detain the water to the extent to which it was detained in 1851, for the use of the grist-mill we ought I think to hold that it was not. In *Knight v. Halsey*, 2 B. & P. 206, the court in their judgment thus explained their principle:—"The presuming a deed from long usage is certainly a novel invention of the Judges for the furtherance of justice and the sake of peace, where there has been a long exercise of adverse right. For instance, it cannot be supposed that any man would suffer his neighbour to obstruct the light of windows and render his house uncomfortable, or to use a way with carts and carriages over his meadows for twenty years respectively, unless some agreement had been made between the parties to that effect, of which the usage is evidence." Now to apply this to the present case. It is not the mere erection of the dam however high it may be, that constitutes the grievance; it is the use that it is made of it by shutting down the gates and keeping the water back. If the defendant had built his dam twenty years before this action was brought, but had let the water run through it or over it the whole of the time until the summer of 1851, and then claimed a right to keep it back for the use of his grist-mill, the principle which I have just cited would surely not be applicable, because the plaintiffs, so long as the water had been allowed to flow over or through the dam would

have been suffering nothing and acquiescing in no injury, and there would be no reason for concluding that there had been any understanding or agreement between the parties; in other words, for presuming a grant. So long as the flow of water was not lessened or obstructed materially, or not at all, it would be mere captiousness to complain. But acquiescing in an act being carried to an extent that does no injury, is a different thing from sanctioning an interference to so much greater extent as to occasion ruin. The argument in this case on the part of the defendant is, that we are to look only to the height of the dam; in other words, to the means which the defendant had prepared for committing a nuisance, not to the extent to which he had been allowed to use, and he had used those means.

But I am of opinion that this is not the correct principle. To what extent has the defendant for twenty years enjoyed the privilege of keeping back the water, is the question, not to what extent he had prepared the physical means of keeping it back. For all that we can tell, it was no inconvenience whatever to the plaintiffs that the defendant used the stream in the months of February, March, and April, for years together, to clean and thresh out his clover-seed. The water is generally high then. The main stream may at such times have given the plaintiffs water enough, if there had been none flowing down this tributary. He would be an ill-natured man who would, under such circumstances, and at such time prohibit his neighbour from using the water as he pleased; but from early in June till October and some times till a later period, those who depend on these streams for turning machinery commonly want all the water that comes down to them, and have generally to suffer from the supply being too slender. Many a man might be quite willing to let a person above him on the stream use the water for a month or two in the winter or spring for driving a trifling machine, who would on no account suffer him to detain it as often or as long as he might choose throughout the year for driving a grist-mill; and if this be so, it would be unreasonable to infer from the one being suffered that permission must have been given

to do the other. And this applies, I think, with even greater force when a defendant is setting up a prescriptive right, for that leaves no discretion to a jury to presume a grant, or not, as they may think reasonable from all the circumstances; but the aim then is to establish a clear and absolute right by the aid of the statute, and it is incumbent on the party to shew that he has really enjoyed for twenty years, as of right, as great a privilege as that which he has assumed to exercise on the occasion complained of.

In many countries we see land in the highest state of cultivation without inclosure; and when in winter the ground is frozen and covered with snow, the owner might well suffer the liberty to be taken by others of walking or riding over it; but it would be unreasonable to contend that by using that liberty for twenty years at such seasons a party would acquire a prescriptive right to cross the same ground at all seasons, and even when it was in crop. There are many cases which have been decided upon the principle that the privilege formerly used has been exceeded, and in my opinion this case comes within that principle. I refer to *Ballard v. Dyson*, 1 Taunt, 279; *Rex. v. Marquis of Buckingham*, 4 Camp. 189; *Jackson v. Stacey*, Holt's N. P. C. 455; *The Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Drewell v. Towler*, 3 B. & Ad. 737; *Cowling v. Higginson*, 4 M. & W. 245; *Onley v. Gardiner*, 4 M. & W. 496; *Martin v. Goble*, 1 Camp. 323; *Bealey v. Shaw*, 6 East. 208; Com. Dig. "Action upon the case for a nuisance," C.; *Moore v. Rawson*, 3 B. & C. 332; *Cotterell v. Griffiths*, 4, Esp. 69; *Garrett v. Sharp*, 3 A. & E. 325; *Blewett v. Tregonning*, 3 A. & E. 583; *Tickle v. Brown*, 4 A. & E. 382; *Rex. v. Tippet*, 3 B. & Al. 193; 2 Saunders, 175, K, note c.

In *Bealey v. Shaw*, 6 East. 216, which is a leading case on this branch of the law, Lord Ellenborough says, "The evidence amounts to no more than this, that the plaintiff, to avoid litigation, agreed, during that time, to receive his right in a manner more abridged than he need have done; but afterwards, when the attempt was made to take all the water from him, he stood as he lawfully might, upon his

strict rights, and brought his action for the obstruction." The reason of this observation applies to the present case, though the facts are different ; and I do not think that the necessity for the proper proof of this plea of prescription was at all affected by the nature of the enjoyment before 1839, but which was not continued afterwards.

It has been objected by the defendant's counsel, that the point was too much withdrawn from the jury at the trial, and that it should have been left to them to determine whether there was an excess in 1851, above the former user. When the question is, whether a grant may be presumed under the circumstances, which presumption there may be many things to repel, even though there may have been a twenty years' user ; and so also under the prescription Act, when the conduct of the party has been equivocal, or the evidence conflicting, so that there is room for entertaining a question whether, from the user that has been permitted, a general right to use for all purposes that may be necessary has or has not been enjoyed—there would be a question for the jury ; but in this case there was really no such question of fact to determine upon doubtful evidence, for the evidence in regard to the user from 1839 to 1846, was not conflicting. It shewed clearly and precisely, from the mouth of the defendant's own witnesses, what the fact was, and it left only the question of the law, whether the use of a privilege to use the water of the stream for one or two months in a year when for all that appeared, such user occasioned no injury or detention, would support a plea of a prescriptive right to detain the water whenever the party pleased ; and all the year round, at whatever injury to the parties who would otherwise have been entitled to, and who had before actually enjoyed, during nine months of the year, the use of the water flowing unobstructed in its natural channel. In *Morewood v. Wood*. 4 T. R. 157, Ashurst, J., lays it down that all prescriptions are in their nature entire, and that though a person plead a prescription in a more extensive manner than he need do, he must prove it as laid ; and in the same case, Grose, J., says, "unless the defendant prove the whole prescription as it is laid, he must fail." Now,

here the defendant alleges, in his sixth plea, that, "for twenty years *next before the bringing this action*, he enjoyed without interruption, the right of *stopping the water to such an extent*, and for such a time, as was necessary to enable him to make full use of the water for beneficially working and using his mill." And he adds to this the averment, that, to enable him to do this, "*it was not at any time necessary for him, nor did he keep the water back to any greater extent or for any longer time than had been necessary during the existence of the mills so destroyed and removed.*" But it cannot be said with truth, that the defendant did not, in August, 1851, for the use of his grist-mill, keep back the water to a greater extent, *and for a longer time*, than had been necessary for him to do from 1839 to 1846 for working his clover-mill, which period formed a great portion of the twenty years in question."

The sufficiency of this plea, in setting up a prescriptive right of taking whatever water the defendant might require, is not now in question, but we had occasion to consider it upon the demurrer to the 5th plea—8 U. C. R. 563; and in the case of Buell v. Read, in this court, 5 U. C. R. 546, a question somewhat similar to that presented in this case was before us, and was decided in accordance with the opinion which I have expressed in this case. The facts of that case, however, were not so exactly like those in the present case as to make it clearly applicable.

The affidavits are not such as would warrant a new trial. They only shew that the evidence might be carried somewhat further in the defendant's favour upon another trial (though not so as to make a clear case) by witnesses who were either examined at the trial, or might have been, or ought to have been, if their evidence would have been useful; and besides, they refer to the evidence that might be given on a point which is not material—that is, whether more than a year elapsed after the saw-mill was down before the water was again dammed up and used. That, as I have already mentioned, is not the point to be inquired into under the Prescription Act,—but whether the defendant

submitted for a year to an interruption of the user occasioned by the interference of others.

The defendant's counsel has urged that the court may allow a new trial and amendment; and he refers, on this point, to *Onley v. Gardiner*, 4 M. & W. 496. In that case the defendant had the verdict at the trial, but with leave reserved to the court to enter a verdict for the plaintiff with nominal damages. The court thought the plea, which was a plea of prescriptive right under the statute, was not supported by the evidence, and therefore held the plaintiff entitled, on the pleadings and evidence, to a verdict; but were willing to give the defendant a chance of supporting his case under a plea of immemorial user, and therefore forbore to change the verdict by entering one for the plaintiff instead, but deprived the defendants of the verdict which he had obtained at the trial, and granted a new trial, with permission to the defendant to amend his pleadings by setting up the defence of immemorial user.

Here the plaintiffs have a verdict which, in our judgment, they were entitled to under the pleadings and evidence, but we are asked, nevertheless, to deprive them of it, in order to let the defendant, after a trial, into a new defence; and this after the pleadings have been all before us on demurrer. I am not disposed to do this, and should not hesitate in declining, if it be quite clear that this verdict will not be conclusive as to the defendant's right; and at any rate, I am not disposed to allow such an amendment in this stage, and after what has occurred in the cause. The statute of prescription was passed for the very purpose of putting an end to the unseemly practice of setting up a pretended non-existing grant in such cases, and calling upon the jury to affirm it on their oath, when there was no reason to suppose that in truth such a grant had never been made; and my impression respecting the Prescription Act is, that the legislature should be taken to have intended that were the defendant could shew a prescriptive right such as that statute requires he should be entitled to succeed without the exercise of any discretion on the part of the jury; that the statute should serve him as a kind of parliamentary

conveyance of the easement; but that on the other hand, when the party could not shew such a prescriptive right in the terms of the statute, his pretensions to have a jury supply the deficiency, by affirming an imaginary deed which had been lost by time or accident were no longer to be favoured. Of course the Prescriptive Act does not interfere with any of those cases in England, where a party may be able to rely upon immemorial enjoyment, knowing that no evidence can be given of any period within legal memory when the right which he sets up were not enjoyed by those through whom he claims; and immemorial user is what the court, in *Onley v. Gardner*, were willing the party should be allowed to plead. A case of enjoyment of such a privilege for forty years, under our statute, would place the party on the same ground, and give him an indefeasible right.

But where there has not been so long enjoyment, and a party is left to the verdict of a jury to find in his favor a supposed grant, then various circumstances in the conduct of the party may prevent such finding; and in this case there was a good deal in the declarations of the defendant, within a recent period, inconsistent with the idea that he was asserting any such right as a grant would have given him.

Rule discharged.

DOE DEM. SPRINGER V. MILLER.

Nisi Prius record in ejectment—Irregularities in.

In a *Nisi Prius* record in ejectment the first *placitum* was of Trinity term, 14 Vic., 1851, instead of 1850; and the second of Hilary term, 15 Vic., 1851, instead of 14 Vic.—the year of our Lord being wrong in the first place, and the year of the reign in the second. These objections were overruled at the trial, and afterwards renewed in *banc*. The court would not entertain such objections as a ground for setting aside the verdict, and would have allowed an amendment if necessary, but they held it not to be required, as the record might be made correct by rejecting what was inaccurate.

Quære, Whether the 40th rule of H. T. 13 Vic. does not apply to ejectments, and whether, therefore, there was any ground for the exception taken?

An award of *venire* is not necessary.

The facts of this case were similar to those in *Doe. Tiffany v. Miller* and the judgment given there was commented upon and adhered to.

The land sought to be recovered in this action belonged to Miller, the defendant. On the 20th of February, 1837, a

fi. fa. against Miller's lands, at the suit of the Bank of Upper Canada, tested the 19th of November, 1836, and returnable on the last day of Hilary term, 1838, was put into the hands of Mr. Jarvis, then being sheriff of the district of Gore; and on the 6th of March, 1839, Mr. Jarvis, who had in the interval ceased to be sheriff, executed a deed of bargain and sale—reciting this *fi. fa.*; that it had been delivered to him on the 10th of February, 1837, he then being sheriff of the district of Gore, to be executed according to law; that he did thereupon seize and take in execution, under and by virtue of the said writ, certain lands therein described as the lands of Miller; and that, after having duly advertised the same according to law, he did, on the 2nd of March, 1839, expose the said lands for sale at public auction at the Court House in Hamilton, and sold the same to Miles O'Reilly, esquire, the highest bidder for 120*l.* 10*s.*; and by that deed he granted, bargained, sold, and confirmed to Miles O'Reilly, his heirs and assigns, the said land, describing it as bounded on the front or southerly end by King-street, on the westerly side by McNabb-street, and as being a piece of land forty-nine feet six inches in front on King-street, by eighty-four feet in depth on McNabb-street, being situate at the corner of King-street and McNabb-street.

On the 20th of December, 1839, Mr. O'Reilly, by deed of bargain and sale, in consideration of 200*l.*, conveyed to the lessor of the plaintiff, Springer, a portion of the above land, being twenty-eight feet in front on King Street, measuring easterly from McNabb-street, and running back northerly 84 feet. For this tract the present action was brought.

The evidence given on former trials, at the assizes at Hamilton in April, 1850, of the cases of Doe dem. Miller v. Tiffany, 5 U. C. R. 79, and Doe dem. Tiffany v. Miller, 6 U. C. R. 426, was by consent read on this trial, before McLean, J., at Hamilton; and additional evidence was given with a view of shewing that the sheriff's sale, on the 2nd of March, 1839, had been conducted fraudulently, or at least irregularly, in consequence of collusion between the highest bidder at the sale and the late sheriff; that the late sheriff had done nothing while the *fi. fa.* was current

which could be treated as an inception of the execution, and so had no legal authority to sell the lands after his retirement from office; and that the land was sold at a most unreasonable sacrifice.

The learned judge overruled exceptions taken at the trial as grounds of nonsuit, holding that, it being proved that Mr. Jarvis received the writ while he was sheriff, and while the writ was current, and the recitals in the deed and the deed itself shewing that he acted as sheriff in selling and conveying the lands, it remained for the jury to determine, on the evidence, whether there had been in fact an inception of the execution, such as made it legal for the late sheriff to proceed in it; and to determine on the evidence whether there had been any fraud in conducting the sale.

At the conclusion of the whole case, when all the evidence had been received, the learned judge directed the jury upon the several points of the case, telling them that if they believed the account given of what had been done under the writ by Mr. Jarvis while it was current and while he was still sheriff, with a view to its execution, this court had already determined that that would amount to a sufficient inception of the execution; and that the late sheriff might, under such circumstances sell the land, and execute a deed in pursuance of the sale, notwithstanding his having in the interval ceased to be sheriff; and that he was bound to direct them in accordance with this decision of the court. He told them further, that any irregularity in giving notice of the sale would not render the sale void, as a purchaser cannot be supposed to be aware of such irregularity, and has a right to assume that the sheriff had done what was proper in respect to advertising and his manner of selling.

He then gave the jury proper directions as to what would constitute fraud in the conduct of the officer, or the purchaser at the sale; and remarked upon the evidence regarding the value of the land, as compared with the price at which it was sold, and also upon the evidence tending to shew that after the sale the defendant Miller had acquiesced in it, and adopted it, taking the benefit of the money paid by the purchaser, and applying for further indulgence as

to the balance that would remain due. And he left it to the jury to find whether there had been any combination or collusion between Mr. O'Reilly and others, to lead to a sacrifice of the defendant's property at the sale; and whether the defendant had, or had not waived any objections to the sale, and adopted it, by having the funds arising from it applied to the payment of his debt. The jury were told that if they should find that Mr. O'Reilly, the purchaser at the sale, had entered into any such combination as was suggested, with a view to procuring the property to be sold under its value, it would vitiate the sale; and that neither Mr. O'Reilly, nor the defendant claiming under him, could derive any benefit from it: that whether the sheriff had made while in office what can be called a seizure or levy, depended on the fact of his having taken the list of property with a view to its sale under the writ, in the manner in which he stated he had done, and which the court had already determined would amount to an inception of execution of the writ: and that, unless the jury were satisfied that he did in fact do what he had stated, the sale would be unsupported, and must fall to the ground. It was also left to the jury to find whether the land described in the deed had been in fact sold by the sheriff, on the 2nd day of March.

The jury gave their verdict for the plaintiff, declaring expressly that they found that there had been no such combination as was endeavoured to be established between Mr. O'Reilly and others, for the purpose of preventing a fair price being got at the sale; and that the defendant, after the sale, adopted it, and received the benefit of it.

The following objections were taken to alleged irregularities in the *Nisi Prius* record:—That issue appears to have been joined on the 9th of September, 1850, the first *placitum* being as of Trinity term, 14 Vic., in the year of our Lord, 1851, which is repugnant and insensible; and the second *placitum* as of Hilary term, 15 Vic., and in the year of our Lord, 1851, which is repugnant and insensible; that in the award of *venire*, the Hilary term in which the sheriff is commanded to cause the jury to come is not spe-

cified; and that whatever Hilary term is meant, one term must be passed over without any continuance that in the subsequent entry by way of continuance on the record, it appears that the jury were respited in Hilary term, 1850, being before issue was joined, as appears by the record. These objections were overruled by the learned judge.

Connor, Q. C., moved to set aside the Nisi Prius record, and all proceedings had thereon; or that a new trial be had on account of irregularities in the Nisi Prius record, or on the ground of misdirection, or on the law and evidence. He cited, as to the exceptions taken to the record, Ouchterlony v. Gibson, 4 M. & G. 461; Lucas v. Peatman, 7 U. C. R.; Russell et ux. v. Graham, 7 U. C. R. 159; Doe Burnham v. Simmons, 7 U. C. R. 498; as to the other points in the case, Bennett v. Hamill, 2 Sch. & Lefr. 578; Wood v. Downes, 18 Ves. Junr. 120.

Cameron, Q. C., and Vankoughnet, Q. C., shewed cause. They cited Playfair v. Musgrove, 14 M. & W. 239; Bird v. Bass, 6 M. & G. 143.

ROBINSON, C. J., delivered the judgment of the court.

As to the exceptions taken to the Nisi Prius record, the first *placitum*, I suppose, should have been of Trinity Term, 14 Victoria, 1850, instead of 1851; and the second *placitum* of Hilary term, 14 Victoria, 1851, instead of 15 Victoria. In one, the year of our Lord is misstated, and in the other, the year of our reign: but in both the date may be made correct by rejecting what is inaccurate, and preserving only what is accurate. The defendant having made the objection at the trial, it was overruled and he went into his defence. We will not entertain it again now, after verdict, but would at once give leave to amend if it were necessary, which on various grounds, I think it is not. It may be doubted whether, if we take the 36th, 40th, and 45th rules of Hilary term, 13 Victoria, we could properly say that the 40th rule, which gives the form of a Nisi Prius record, does not apply as well to actions of ejectment as other actions, in which case there would be no ground whatever for the exception. In Doe dem. Burnham v. Simmons, 7 U. C. R. 598, we held that ejectments were excepted; but the

objection there was the entire want of *placita* and *jurata*. The objection as to the error in the award of *venire*, is of no moment; because no such award was necessary, and at any rate the Hilary term would be intended to be Hilary then next. As regards the want of continuance, or any error in the continuance, that could never be taken as ground for setting aside the verdict; for when the want of continuances is not cured by the Statute of Jeofails, the court would allow them to be entered at any time.

With respect to the other part of the rule which applies to the merits, I have attentively considered the evidence given upon the trial, and I see no ground for distinguishing this case from that of *Doe dem. Tiffany v. Miller*, 6 U. C. R. 426, in which the same points that have been urged in this case, were very extensively discussed, and the judgment of this court expressed upon them—to which judgment I adhere: for the reasons which I there gave I am of opinion that the plaintiff should retain his verdict, and this rule be discharged. I see no diversity in the evidence that would justify a different decision. This case went to the jury, I think, on such a direction as it was proper to give in consequence of the judgment which the court had pronounced in the case I have referred to, and the different questions to be answered by the jury were presented to them by the learned judge with great clearness and precision; and the jury shewed the same inclination to uphold the titles of the purchasers at the sheriff's sale, which the juries had shewn on former trials growing out of the same transaction.

This case is so far stronger than that of *Doe dem. Tiffany v. Miller*, that this lessor of the plaintiff was no party to the original transaction of the sheriff's sale, but is a purchaser from the sheriff's vendee; and we should feel, therefore, the greater reluctance to disturb his title after so great a lapse of time.

The jury have expressly negatived any fraudulent intention or practice at the sheriff's sale, and I find nothing in the evidence which could warrant me in saying that their verdict is wrong. Any additional evidence that has been given in this case is such as tends strongly to shew that

there is little ground for looking upon the defendant's case as one of great hardship, and I should certainly have felt no inclination, as a juror, to overturn at this late day the title derived under the execution. It seems that it was not very long before the sale in 1839 that the defendant had bought for 300*l.*, the whole six acres which have given rise to this apparently interminable litigation. While it was still his he became indebted to a number of persons, and, instead of remaining in the country and endeavoring to overcome his difficulties, he left his property and his creditors, and withdrew to a foreign country, at a time when he knew that his creditors were pressing, and that there were executions against him in the sheriff's hands.

He was well aware that a sale of his land was contemplated, and was inevitable; he knew that Mr. Jarvis, the late sheriff, intended to expose it to sale under the writ which he had received and acted upon while he was in office; he corresponded with Mr. Jarvis upon the sale, obtained indulgence, thanked him for his conduct, and obtained further indulgence; he had an agent attending at the sale, who saw nothing wrong, and found no fault with the proceeding; and after the sale had taken place, he had credit for the proceeds of it; and he corresponded about a further sale, and about the payment of the balance. There was evidence on the trial, that in 1839, when the land was sold, real estate in Hamilton was of much less value than it had been, in consequence of the recent rebellion; and some who attended this sale considered that it sold as well as could be expected at the time at a sheriff's sale. It is true that Hamilton has now become a flourishing commercial city, and land in that part of it has so immensely increased in value that it seems from the evidence that Mr. Miller has been compromised with for his wife's claim to dower, and his own claim, whatever it may be, in a part of this property for 3750*l.* The temptation is no doubt very great for him to endeavor still to overturn what has been done under the execution thirteen years ago, and done, as the juries have repeatedly found, in good faith; and to profit, if he can, by the increase in the value of the property since

that time, at least as regards that part of it in respect to which he has made no compromise. But in the absence of any fraud in the sale (and the jury have said there was none), I think all equitable considerations are against him, and that we should be doing injustice rather than advancing justice by granting a new trial upon any ground that is discretionary. The policy of the law leans strongly to uphold those who have purchased under execution against formal objections that have no merit in them ; and I can conceive no ground less substantial, after considering all that was proved in this case, than the objection that it was not the late sheriff but the new sheriff that ought to have directed or conducted the sale. The only legal point in this case which was not disposed of by the court in the case of *Doe dem. Tiffany v. Miller*, was the rejection of a letter written to Mr. Miller, sometime between the 2nd and 14th of March, 1839, which was offered in evidence as tending to throw light on the contents of a letter which he had written in answer, or rather to repel the inference of acquiescence which might be drawn from his letter ; but—besides the objection urged on the other side, that the letter was offered for no such purpose, but avowedly for a different purpose, namely, to prove that Mr. O'Reilly was the defendant's attorney, which could not be so proved, and which could not be material—I think that the main facts of the case necessary to make the sale valid having been proved to the satisfaction of the jury, and those facts having been adjudged by the court to be sufficient, it would be idle to grant a new trial on account of the rejection of that letter, admitting that it clearly ought to have been received ; for it only bears on a point of the case not essential to the validity of the title, which must depend on the facts whether there was a legal execution begun to be acted upon by Mr. Jarvis, and afterwards a sale made by him under it, free from any imputation of fraud, and a deed executed in pursuance of that sale.

In my opinion the rule should be discharged.

Rule discharged.

DOE DEM. TIFFANY V. MILLER.

Sheriff's Sale—More land conveyed than sold—Effect of such conveyance—Power of sheriff afterwards to make a correct deed—What is inception of execution of writ against lands.

The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it in such terms, that on the face of the deed no parcel could be distinguished from the rest and allowed to pass alone: *Held*, that he must be considered in the same light with any other person having a power to execute; that he could not be regarded as *functus officio* by the execution of the first deed which was wholly inoperative and void; and that he might therefore, in 1849, make a deed of the part actually sold.

Quære: Whether in this case *the debtor having a title to all the land conveyed*, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone, under such circumstances, though the case might be otherwise if the mistake had arisen from including land not owned by the debtor?

Quære, also: Whether the proper course would not have been to apply to the court to set aside what had been done under the execution?

Burns, J., concurred also in the judgment of the court on other points in this case, before reported.

This action was brought to recover a piece of land in Hamilton, sold at sheriff's sale, as the defendant's "yellow-house property," being about seventy-five feet frontage on King-street, and extending about one hundred and thirty-five feet in rear, so as to correspond with the depth of a lot occupied at the time by Bryan Carpenter, being part of the same block, and lying east of, and adjoining to, the "yellow-house property."

This land was sold by the late sheriff on the same day (2nd March, 1839), upon the same *fi. fa.*, and under the same circumstances as the land sold to Mr. O'Reilly, which was in question in the suit of Doe ex. dem. Springer v. Miller, tried at the same assizes (*a*). It was bid off by this lessor of the plaintiff, Tiffany, for £117.

The late sheriff, Mr. Jarvis, made his deed to Mr. Tiffany on the 6th of March, 1839, in which he described the land as lately occupied by this defendant, and commencing at the south-west corner of land lately occupied by Alexander S. Milne, on the north side of King-street, at the point where the fence between the said Milne and Miller intersects King-street; thence easterly along King-street ninety-two links, more or less, to the corner of land owned by Bryan Carpenter; thence in a line parallel with McNab-

(a) *Ante*, page 57.

street two chains, more or less, to the north-west corner of Bryan Carpenter's land; thence in a line parallel with King-street, easterly, along the northerly boundary of Bryan Carpenter's land seventy-five links, more or less, to McNab-street, thence along the westerly boundary line of McNab-street two chains, more or less; thence westerly in a direction parallel with King-street along the southerly line of the market-place, one chain sixty-seven links, more or less; thence in a line southerly and parallel with McNab street four chains, more or less, to the place of beginning.

After this deed was executed, the late sheriff discovered that it embraced more land than he intended to convey, and more than he had considered he had exposed to sale at the auction four days before—viz., on the 2nd of March, 1839. Mr. Tiffany, the purchaser, had prepared the deed, and Mr. Jarvis swore that he confided in his accuracy, and did not sufficiently examine or reflect upon it till afterwards, when the excess was pointed out to him by a friend of the defendant. The sale having been adjourned by him from the 2nd till the 9th of March, in order to dispose of other lands of the defendant, he then put up to sale again (having told Mr. Tiffany that he would do so) that part of the property comprised in this description which he did not conceive he had sold on the 2nd of March. Mr. Tiffany remonstrated, declared that he and other by-standers considered it had been put up and bid for at the previous sale, and that if any one else should buy it he would persist in claiming it as sold to him on that occasion. He bid upon it when put up on the 9th of March, and it was knocked down to him for £30. The difficulty which has arisen between these parties in consequence of the manner in which these sales were conducted, and the conveyance made, is fully explained in the judgment of the court in *Doe dem. Tiffany v. Miller*, 6 U. C. R. 426.

In consequence, it seemed, of a suggestion made by the court in the course of delivering that judgment, the lessor of the plaintiff prepared a new deed, intended to embrace only the land which Mr. Jarvis swore he intended to sell—that is, the front of the tract on King-street, leaving out all such portion of land in rear as would lie north of a line

produced from the rear boundary of Bryan Carpenter's lot. This deed Mr. Jarvis executed on the 21st of July, 1849. It contained the recitals of the judgment and execution under which the land had been sold, and the sale; and that on the 6th of March, 1839, he (Mr. Jarvis), as late sheriff, did execute a deed to Mr. Tiffany of the land in this latter deed contained, together with the rear portion thereof, as having been purchased together by him on the occasion aforesaid, and described in the said deed as an undivided close; that doubts having arisen whether the rear portion of the said land was upon that occasion actually sold by him—and in consequence, and because of the said portions being described therein as one undivided close, whether the said deed was good for either portion—it was thought advisable to require new and separate deeds from him, as such late sheriff, of the respective portions of the said land; and that he had consented, on application made to him, to execute a new deed for the front portion of the same. And by this deed he did, as such late sheriff, in pursuance of the sale made by him to Tiffany, and in consideration of the £117 to him paid, grant, bargain, sell, convey, and confirm to Tiffany, his heirs and assigns, all and singular the said lands and tenements in the said City of Hamilton, containing by admeasurement 8880 square feet, more or less, and being composed of a part of Andrew Miller's six acres in the said city, described as follows:—"Commencing on the northerly margin of King-street, and at the distance of 41 feet from the intersection of the westerly limits of McNab-street, thence along said King-street on a course north 68 degrees 20 minutes 68 feet; thence north 18 degrees 40 minutes, east 136 feet, more or less, to a stone monument; thence south 68 degrees 20 minutes east, parallel to King-street aforesaid, 62 feet, more or less, to the lands deeded by the said Miller to Bryan Carpenter; thence along the western limits of the said Carpenter's land on a southerly course 136 feet, more or less, to the place of beginning.

At the trial of this cause, before McLean, J., at Hamilton, evidence to the same effect as was given in the suit brought

by Springer was given in this case, respecting the proceeding of the late sheriff before and at the sale, the conduct of bidders, the apparent acquiescence of Miller in the sale, &c., and at the conclusion of the case, the learned judge directed the jury to, the same effect as in Springer's case, in regard to such questions of law or fact as were common to both suits.

As to the question peculiar to the present case, he told the jury that objections had been taken to the title of Tiffany under the deed of 6th of March, 1839, because it was alleged to embrace property which had not in fact been sold while it contained no specific description of the particular property which had been sold, by which it could be distinguished and separated from the other part; that in consequence of this difficulty this second deed had been given, confined to such part as the sheriff conceived he had sold, and as he intended to tell; that the question was what land was actually sold; that the sheriff had put up the "yellow-house property," understanding, as he explained, that he was selling only a certain tract held with the house, and fronting on King-street, but not extending to the rear to Market-street. And the learned judge told the jury, that though the sheriff did not know exactly the quantity of land in the premises attached to the yellow-house, yet if he put up the property in such a manner as that the bidders and bystanders understood that the whole property was put up for sale, and bid accordingly, the purchaser would be entitled to a deed for the property actually put up under that designation; that there was evidence that some of the bidders considered that the whole front on King-street was put up for sale and the rear also, excluding only the lot that had been sold to Carpenter; and if it were taken not to be so, then that it was not clear by what line in rear the part sold should be bounded, unless the land attached to the yellow-house were understood to extend as far back as the lot sold to Bryan Carpenter out of the same tract, and no further, which would be 136 feet; there being in fact no fence across in the rear of the yellow-house property separating it from the land behind.

On the whole, the learned judge directed the jury to find whether there had been an inception by the late sheriff of the execution, while he was sheriff, and the writ was current. 2ndly. Whether the late sheriff did in fact sell the whole front on King-street, about 70 feet, as the yellow-house property. 3rdly. What was the depth of the property sold. 4thly. What was the depth of the property used with and belonging to the yellow-house.

The learned judge remarked, that if the 75 feet in front had in fact been sold, the plaintiff must be entitled to a verdict and would have to take possession under the *hab fac.* at his peril, but that his right to a verdict for anything was subject to their belief of those facts having taken place which this court had already decided would amount to, or be equivalent to, a seizure by the sheriff while the writ was in force.

The jury gave their verdict for the plaintiff, and they expressly found that there was a levy made by the sheriff while in office; that the whole front on King-street up to Carpenter's lot, was sold by the sheriff to this lessor of the plaintiff, and that the premises sold as the yellow-house property extended as far back as Bryan Carpenter's lot, being 136 feet.

They found also an acquiescence in the sale by the defendant, by which they probably meant only that the defendant acquiesced in the sale taking place by Mr. Jarvis under that writ, and as upon a previous seizure made by him.

It was objected at the trial, that the late sheriff could not legally, after so great a lapse of time, if at any time after the execution of his deed of the 6th of March, make another deed as in pursuance of the sale; that he was *functus officio* when he had made his first deed, and could not afterwards execute another. The learned judge ruled otherwise.

Connor, Q. C., obtained a rule *nisi* for a new trial on the ground of misdirection, and improper rejection of evidence, and on the law and evidence.

Cameron, Q. C., and Vankoughnet, Q. C., shewed cause.

This case was argued at the same time with that of Doe dem. Springer v. Miller. The authorities cited will be found in the report of that case.

ROBINSON, C. J., delivered the judgment of the court.

The facts which have given rise to the contention about different portions of the land belonging to the defendant Miller, in the City of Hamilton, have been stated already in a former ejectment brought by the present defendant against the present lessor of the plaintiff, reported in 5 U. C. R. 79; and in another ejectment between the same parties, and reported in 6 U. C. R. 426, as well as in the case of Doe dem. Springer v. Miller tried at the same assizes with the present case, and in which we have just now given judgment (a).

The judgment which has just been given in the latter case decides, as I consider, the questions which have been raised in this case respecting the validity of the sale by the late sheriff after he had retired from office, and so far also as regards any imputation of fraudulent combination or practice in the bidders at the sale, or any alleged fraudulent conduct of the lessor of the plaintiff. The only question raised in this case which has not been disposed of in the other cases turns upon the peculiar circumstances of the alleged uncertainty as to the quantity of land which was actually sold by the sheriff to the lessor of the plaintiff at the first sale, on the 2nd of March, and the legal construction and effect of either or both of the deeds which have been made to him by Mr. Jarvis for conveying the property sold or intended to be sold.

In the ejectment brought by Mr. Miller against Mr. Tiffany, the present lessor of the plaintiff, the particulars of which are reported in 5 U. C. R. 79, it was found by the jury that some part of the land which was embraced in the deed made by the late sheriff to Tiffany, a few days after the first sale, had not been knocked down to Tiffany at that sale, though he may have imagined that it was put up by the sheriff at the same time with the other, which indeed appeared to have been the impression of another person

(a) Ante page 57.

who was present and who bid at the sale. As regarded this portion, therefore, (the rear part of the block), the sheriff's deed, according to the finding of the jury, was not supported by the sale; and the difficulty was, that it was all described in the deed as one tract, and there was nothing on the face of the deed, nor indeed in the evidence, to shew with precision what the deed could pass, if it could not legally pass all that was described in it. It was intimated by the court in their judgment, that a proper deed might yet be executed by the late sheriff for completing the transfer of the portion which was free from difficulty. In consequence, it seems, of this suggestion, the deed of the 21st of July, 1849, was executed by Mr. Jarvis, reciting the execution and sale, as the deed did which was executed on the 6th of March, 1839; and reciting further, that doubts had arisen respecting the rear part of the tract described in that deed, and that it was thought advisable to make new and separate deeds of the respective portions. And in this deed Mr. Jarvis gives a distinct description of that part in respect to which it seems he thought there could be no dispute that it was, on the 2nd of March, 1839, put up and sold to Mr. Tiffany, describing it as I have already mentioned, and declaring that he had sold that land to Mr. Tiffany on the 2nd of March, by public auction. The question now is, whether that deed can be of any avail for overcoming the difficulty arising from the first deed having conveyed more than was sold; and whether under it or the first deed, the lessor of the plaintiff can recover any and what land? What he goes for in this action is what the plaintiff calls the "yellow-house property," being about 75 feet in front on King street, extending back 136 feet in depth, and having its rear boundary in a line with the rear of a lot that had been previously sold to Bryan Carpenter, on the south-east corner of this same block, which also fronts upon King-street. The jury found, on the trial of this cause, after hearing a great deal of evidence, that this was precisely the tract which the late sheriff did put up to sale under the execution, and knock down to Mr. Tiffany; and for which the latter paid £117, which went to satisfy

the executions against Miller. I am not dissatisfied with that finding. My conviction from the evidence is, that no one imagined that the sheriff was selling anything less, the doubt rather being whether Mr. Tiffany and other bystanders did not understand that not only the 75 feet in front, but the land through the rear was also sold. The sheriff surely sold something for the 117*l.* which he received from Mr. Tiffany, and I cannot say that the evidence was such as should have led the jury to any different conviction than that which they found after careful deliberation.

The defendant's endeavor was to shew that the sale was restricted to about one-third, I think, of the seventy-five feet front; for that Miller had laid out, or intended to lay out, the seventy-five feet into small lots, and that there was only one of these small lots put up. The jury were not satisfied that that was the fact, but found that, under the designation of the "yellow-house property," Miller's house on the south-west corner of the lot was what was put up, with the land between that and Carpenter's, which was not separated by any inclosure from the house; and as they were satisfied from the sheriff's evidence that he had not put up, or intended to put up, all the land in rear to the next street, but only that half of the block which was intended, like Carpenter's, to front on King-street, they knew no other conclusion the bidders could have come to as to what they were buying, than that they were buying the vacant tract on King-street yet remaining part of the yellow-house property, carried back to the rear of the lots intended to front on King-street—in other words, of the same depth as Carpenter's; and this is the land sued for. I think that was a natural conclusion to come to, and that we should not find fault with that finding.

Then, taking that to have been sold, has it been conveyed by the deed or deeds which followed the sale, or has any portion, and what, of the land sued for in this action been so conveyed? All are agreed that without a conveyance by deed following a sale of real property by the sheriff, the title of the purchaser is not complete, even where a term only has been sold. The case of *Doe dem. Stevens v.*

Donston, 1 B. & Al. 230, is an authority on that point, and I suppose it was never doubted.

Then here, we have upon this trial the fact specially found by the jury, that the sheriff did in fact sell the land which is claimed in this action; and we see that in the nature of things, looking at the position of the tract at the time, that might very well have been intended by the sheriff, and understood by the bystanders. The property had a double front, and it is not usual in such cases to sell the whole depth together as one property. Still Mr. Tiffany did affirm that he conceived that he was bidding for the whole, and that the whole was knocked down to him; and we are not entitled, I think, to assume that he was not sincere in this, when we find an indifferent witness swearing that he was at the sale, and had the same impression. So we will suppose that Mr. Tiffany, meaning nothing wrong, prepared a conveyance for the sheriff to sign, embracing the whole—that is, the rear half as well as the front—and the sheriff signed it. Now that the jury have found what the sheriff did sell, we must apply our knowledge of that fact so found in considering the effect of this first deed. The report of the evidence upon the first trial between these parties (5 U. C. R. 79), states very fully the facts as they then appeared, and the points which they presented to the court. Miller was in that case the plaintiff, and the verdict for him was sustained upon the ground that the defendant was not in a situation to contest his title, having got into possession by collusion with Miller's tenant; but the court did also go into the consideration of what might be the effect of this deed of the 6th of March, given, as it was, for more land than had been sold, though not fraudulently given. On recurring to what was said by myself on that point, in page 89 of the report, I see that I was then under the impression that as the description in the deed embraced one entire tract, not several distinct tracts in regard to which it could be shewn that one had been sold and the other not, there was no foundation for the admission of parol evidence that could have the effect of detaching one portion from the rest, as standing under different circumstances; and I added

that, taking the evidence as it was given, I did not then see how the tract described as one should be divided, so as to make the deed operate legally on one part, and leave it inoperative on the other. Taking that view, I suggested that such a deed might yet be made as would be consistent with the sale, and would leave only the other question to be tried, whether under the circumstances Mr. Jarvis had legal authority to sell.

I am not sure that what I then threw out in discussing the probable effect of this deed, if the point should come up in a case in which the title would necessarily require to be pronounced upon, is not assuming the point too strongly against the legal effect of this first deed, if we are to understand, as I think we must, that no fraud had been practiced either by the sheriff or upon him, which led to the deed being expressed in the terms in which it was: and taking also into view that we, now at least, see exactly by the verdict of the jury what was the piece of land which the sheriff did actually sell to Tiffany.

Suppose the fact had been that Miller had himself bought the whole tract described in this deed from different persons, taking from one the portion on King-street by one hundred and thirty-six feet deep, and from the other person the rear portion fronting on Market-street; that the sheriff had undoubtedly under this *fi. fa.* sold the whole to Tiffany, and described it in his deed as it is described in that of the 6th of March; and that it turned out afterwards that the person who sold the rear portion to Miller, had no title; would not the deed still operate to pass the front half to Tiffany, if he chose to retain it, and stand by his purchase? I think it would. Such cases have probably happened, and may very well happen, both with respect to lands and goods. A farmer's goods, for instance, may be sold in execution, and among other things a hundred bushels of wheat in a bin, and it may be proved afterwards to the purchaser, who has paid for the whole, that ten bushels of it belonged to a neighbour; the sheriff, vendee would still have a good right to the ninety bushels.

If, in the case before us, the sheriff had been selling, as

Miller's two farm lots, being numbers one and two in a certain concession, and, after speaking of them both to the public at the sale, had put them up separately, and knocked down number one to Mr. Tiffany; it might possibly have happened that Tiffany, not aware that they were being sold separately, thought he was bidding for both, and that he had bought both, and that he prepared the deed accordingly; and the sheriff, assuming the deed to correspond with the sale, signed it without looking at it: if, in such a case, when the mistake was discovered, Tiffany should be still willing to acquiesce in the sheriff's account of the sale, and let his money go for the one lot, which was in fact knocked down to him, could he not hold it under his deed, although the deed professed to convey the two lots? One is disposed I think, at first view, to say that he could not, or rather that he ought not; for there is a difference between such a case and these I have supposed in which the debtor had no title; for there the sheriff's deed could pass nothing, and could work no injury to the debtor, or to the real owner of the property, in respect to the property wrongfully included in the deed. But when the sheriff's deed, as in this case, includes more than was sold, then the sheriff is affecting to transfer what he had not by a previous sale entitled himself to transfer. The debtor's title being good, the deed is capable of affecting it, and will affect it, on any occasion on which it may be advanced, unless the debtor or his heirs are always prepared to shew, what at a distance of time would be impossible, but what in the absence of such proof would be assumed against them—namely, that the deed embraces what was never in fact sold. The question is, whether, to avoid that consequence, it is not necessary to hold that the deed requires to be supported by a sale that accords with it, as the execution must accord with the judgment; and that the deed, therefore, cannot be upheld as to one part, if it is untrue in regard to another, in other words, that the sheriff's deed, considered as a part of the proceedings in execution, which in fact it is, must be held to be so far indivisible in its operation, that if it cannot pass all which it conveys—not by reason of any defect of title in

the execution debtor, but because the sheriff did not in fact sell or even seize a part of that which he has assumed to convey—it can have no operation at all, but falls wholly to the ground. If it would be correct to hold this, then the intimation which I ventured to throw out in the first case between these parties is correct. We can only determine the point upon principle, for I find no decision in any case of the kind.

It may be that the proper course in such case was to apply to the court to set aside what had been done under the execution.

If it could be held that, either in procuring the deed by Tiffany or in giving it by the sheriff, there was fraud, either actual or legal, that might diminish the difficulty of treating the deed as wholly void on that account; for it is a principle of law that a deed or other security tainted with fraud is wholly void, and not only in respect to that part to which the fraud more particularly applies; but this seems rather to have been a deed executed upon misconception, where there was no misrepresentation or deceit. It all happened from the sheriff not taking the trouble, before signing, to read the deed, which was erroneous, but not made so by design: one of those cases in which the remedy is usually sought in equity. In this case, however, if it be true, as was admitted, I think, on the trial, that Miller has actually received a large consideration from Tiffany for his interest in the rear portion, and has compromised his claim to it, he would have no case to go into equity with, and the deed would be left to its operation.

But I quite understand that it was part of the arrangement which I refer to, that it should not affect the decision of the question whether the sheriff's deed can operate to pass any portion of the tract. That was stated to us in the argument. So that a legal question is submitted to us to solve, when really, after what the parties have done, all occasion for raising this particular question ought to have been considered at an end, whatever exceptions the defendant might still be at liberty to urge on the ground of the want of authority in Mr. Jarvis to make any sale.

But taking the case most strongly against the plaintiff upon the first deed, and assuming that deed to be so wholly void that it passed nothing, because it was not made in conformity with the sale actually made, then we have to consider the effect of the second deed made by Mr. Jarvis in 1849. The first deed being void, the case would be the same as if no such deed had been made as that of the 6th of March, 1839; and if that had been the case could Mr. Jarvis, in 1849, have executed a conveyance upon the sale made by him in 1839? I do not see why he could not. My opinion is, that he could. In *Doe dem. Stevens v. Donston*, 1 B. & Al. 230, the deed was executed six weeks after the sheriff's sale, and it was insisted that it was inoperative, for that it must be executed before the writ was returnable; but the court gave no countenance to the objection. The sheriff, in such acts of duty, is to be regarded as executing a power, and it was rightly put on that footing, I think, by the plaintiff's counsel on the argument. If a person authorized as attorney to convey land to another had by mistake executed a deed of the wrong premises, he could surely, while his authority continued unrevoked, make a deed of the premises which he was directed to convey, no matter at what distance of time. Then, what is there that should make a difference in the case of a sheriff? We are to assume, in this part of the case, that Mr. Jarvis had the same right to act in the matter as if he had not left the office. Supposing, then, that he had always been sheriff up to this time; and that up to 1849 he had made no conveyance to the purchaser, whose money he had received and paid over on the execution—could he not then have made a deed? I think he could. Then the difference in this case is, that he did make a deed long before 1849; but if that deed was, from a misconception totally inoperative, why should it obstruct his making another? If he had put up lots A & B, and sold them to Mr. Tiffany, but in making the deed afterwards had left out lot B, I consider that he could the next day or the next month have executed a deed conveying lot B; and if he could, then he could equally do it after a very much longer

interval, for I see no line that we could draw on principle, either by statute or common law. It might be dangerous as regards intermediate purchasers, whose rights might be affected; but the same thing might have been said in the case of *Doe dem. Stevens v. Donston*, for the debtor, in the six weeks that had elapsed there, had time enough to have made assignments to others of his term: and the fact is that in this case we have the advantage of seeing clearly that we have only to deal with the original parties—the debtor, and the person who purchased under the execution against him.

If the sheriff had made a deed clearly void for uncertainty—as, for instance, if he had recited that under the *fi. fa.* he had seized and sold *certain lands* (not giving any other description of them), and then, in granting part had conveyed “*the said lands*” without any further description, surely that idle act would not estop him from afterwards conveying what he really had sold. He could hardly be said to be *functus officio* by doing nothing. Then here the sheriff having, as the jury found, sold only a part of a certain tract, makes a deed of the whole tract; and so describes it that no one can see, on the face of the deed, any parcel separate and distinct from the rest, which might be allowed to pass alone. Could he not afterwards make a deed that shall convey what he did sell? I am of opinion that he could; for it would be unreasonable that, having received the purchaser's money, and paid the execution debt with it, he should be held estopped from completing the execution by an act which we think we must hold to be futile and wholly inoperative. It is to be considered that in this case the jury have expressly negatived any fraud in the matter; and further, that the second deed has been made, not by way of enlarging what had been done before by conveying more land, but by restricting the conveyance to what was undoubtedly sold. It is to correct an error in favor of the debtor, not to his prejudice. If the sheriff had assumed at this late day, to make a fresh deed, on the pretence that the former did not contain all that he had sold, the case would be attended with very different considerations

My opinion is, that under the deed of July, 1849, the land now claimed, and which the jury found was sold, is legally conveyed; and that the verdict for the plaintiff should stand. I am aware that the defendant has contended, that all that was put up and sold was one small lot on King street, not the whole 75 feet, and has not admitted that the whole land on King street was sold. He had a right to try that question, and his contending for it is not inconsistent with the compromise made respecting the rear half; but the jury have found expressly that it was the whole 75 feet in front by 136 feet in depth that was put up and sold, and I am satisfied with that verdict on the evidence, though there was some testimony the other way.

BURNS, J.—It is quite unnecessary for me to enter into any details of the facts of the case, for, as proved on the present trial, they are substantially the same as they have been already stated in the reports between these parties.—5 U. C. R., page 79, and 6 U. C. R. 426. The questions now are, whether the learned judge at the trial properly directed the jury, and whether the verdict for the lessor of the plaintiff is in accordance with the law on the evidence. The jury, in answer to the questions put to them, have found that there was a levy by the sheriff while in office upon Miller's lands; and that the land described in the deed of 21st July, 1849, was sold by the sheriff on the 2nd of March, 1839, to the lessor of the plaintiff. It may not be precisely technical to ask the jury whether the sheriff had made a levy, because whether from what he did it amounts to a levy is a legal question. We see from the case what facts the jury had to take as amounting to a levy, and the repeated trials had between these parties leave no room for doubt as to what the jury perfectly understood was required of them to find on this point. The questions which the case seems to resolve themselves into are these:

1st. Can a sheriff who has received a writ against lands, and who, while that writ is current, and before he has advertised the lands for sale, has ceased to be sheriff, proceed afterwards to sell and convey the lands in execution of the writ?

2nd. What act of the sheriff, upon an execution against

lands, amounts to an inception of executing, so as to entitle him, after he ceases to be sheriff, to complete the execution: and whether what was done in the present case amounted to a legal beginning of execution ?'

3rd. With what act the power of the sheriff ceases; and whether, when it is found he has executed a conveyance erroneously for lands sold under the execution, he still, notwithstanding his having ceased to retain office, can execute a conveyance in accordance with the sale so as to vest title in the purchaser ?

With regard to the first question, taking it abstractedly as I have put it, I cannot allow myself to say a word which would have the effect of throwing a doubt upon it, and though it might have been more convenient for all concerned, perhaps, that in respect to lands the new sheriff should have completed the final execution, as he does upon writs against the person, yet it has been held on several occasions, and this has been acted upon, that the sheriff who has begun an execution against lands may finish it; and to vary from that now might produce a most injurious effect. Without saying more upon this, I proceed at once to the second question.

We depend upon the stat. 5 Geo. II., ch. 7, for the right to dispose of lands for the purpose of satisfying debts, and they are to be subject to the like remedies for seizing, selling, and disposing, and in like manner, as personal chattels. Our provincial statute 43 Geo. III., ch. 1, enacts, that executions against lands shall be after the return of executions against goods, and shall not be included in the same process; and that the writ against lands shall not be made returnable in less than twelve months from the *teste*, nor shall the sheriff expose the same to sale within less than twelve months from the day on which the writ shall have been delivered to him. We must keep in mind the difference of the mode of executing writs against goods and against lands. In the case of goods personal, the sheriff deprived the execution debtor of the possession of them, and delivered them on sale to the purchaser; but in the case of lands—as, for instance, upon an *elegit*—the older

books say, that actual possession cannot be delivered by the sheriff; that he could only deliver seizin in law to enable the plaintiff to maintain ejectment. The latter authorities would seem to shake this position; for it is said that a person who has a right of entry may make entry peaceably, and being in possession, may retain it as his soil and freehold. It seems to have been thought, however, that it was safer that the plaintiff should bring his ejectment. The same result appears to be the case where the lands are a chattel real, liable to execution by writ of *fi. fa.*, because it is necessary that the sheriff should execute a conveyance after selling, in order to comply with the Statute of Frauds—*Doe Hughes v. Jones*, 9 M. & W. 372. As respects lands, the sheriff had no right to deprive the execution debtor of the possession, nor could the sheriff's vendee enter and assume the possession, unless perhaps, indeed he had found the premises entirely vacant, or could have entered as I have before suggested. The provincial statute I have mentioned makes no mention about the sheriff advertising the land, and is altogether silent as to anything the sheriff shall do during the twelve months the writ must lie in his hands. I have no doubt that during this period the sheriff could do no act that would deprive the debtor of his use and occupation of the lands, and the sheriff would not be responsible for any alterations or changes that might take place in respect to it, and neither could he maintain any action against any person for either trespassing upon the land or otherwise. The distinction between the execution against goods personal and lands, I take to be this: in the case of goods personal, in order that they shall be in the custody of the law, it is necessary that the sheriff shall have a continued and actual possession according to *Blades v. Arundale*, 1 M. & S. 711; but in the case of lands, they are to be considered in the custody of the law from the time of lodging the writ in the hands of the sheriff, and no actual custody of the lands was needed or required. Six years after the statute I have mentioned, the legislature passed another—49 Geo. III., ch. 4—the 5th section of which enacts, that no sheriff or other officer “shall

proceed to the sale of any effects, taken by virtue of any writ of execution, until public notice in writing thereof is given, at least eight days previous thereto, at the most public place in the town or township where such effects may have been taken in execution, of the time and place where such effects are to be exposed to sale." What the practice may have been with respect to lands, or whether this statute was held or thought applicable to them, I do not know, and I have not been able to ascertain. The words of the act would seem wide enough to embrace lands as "*effects*," if the words "*taken by virtue of the writ*" will include what is in the custody of the law merely by means of the writ lodged, as well as those in actual custody of the sheriff under the writ.

In 1811 the legislature passed an act, the object of which was, in part, to regulate the mode of proceeding by the sheriff upon writs of execution against goods. The statute I mean is 51 Geo. III., ch. 6. Of this act sections 2 and 3 provide, that, on request of the person to whom the goods did belong, the sheriff shall deliver to him or his agent an inventory of the goods, before they shall be removed from the premises on which they were seized; and that no sheriff or his deputy, or any bailiff or constable, directly or indirectly, shall purchase any goods or chattels exposed by him to sale under or by virtue of any writ of execution. In these provisions is clearly recognized the distinction which must necessarily exist between what the sheriff does upon an execution against goods, as distinguished from that against lands. Then comes the statute of 1822—2 Geo. IV. ch. 1—the 20th section of which recites, that it is expedient to provide for the more public and certain notification of sales of land under execution and enacts that, before the sale of any real estate the sheriff shall cause an advertisement to be inserted in the Upper Canada Gazette, at least six times before such sale, specifying the particulars of the property to be sold, and the time and place of the intended sale, provided nothing therein contained shall be construed to prevent an adjournment of the sale. This advertisement might, I apprehend, be given at any time before the

expiration of the twelve months, for the sale to take place after that time; and if the sheriff should do nothing more than insert such an advertisement in execution of the writ, it may be asked, would he have a right to proceed to sale? It appears to me it is not open to doubt that he would have a right to sell the lands under such circumstances. Such an act of the sheriff would be a beginning to do something while the writ was current in his hands, without his having made what might be called a seizure, as by an entry upon the land or anything equivalent to it. If the sheriff had done nothing whatever towards executing the writ during the twelve months that it was lying in his hands, I agree that he could not after that period legally do anything as of himself or on the part of those who set him in motion towards executing the writ. The insertion of the advertisement while the writ was current would certainly be a beginning to do something upon the writ and the question now is, whether there can be, by any other means a beginning of the execution which will have a similar effect. The next statute connected with this subject was passed in 1837—7 Will. IV., ch. 3—and up to this time not one of the statutes, with the exception of the Imperial act 5 Geo. II. ch. 7, speaks of there being or having been a seizure of lands; but when the lands are spoken of or mentioned, it is the sale which is mentioned; but it is otherwise when goods are mentioned. The 32nd section of 7 Will. IV., ch. 3, is the first of our statutes which speaks of lands seised. I do not understand this statute to mean, that in case of lands there must be something done by the sheriff which would amount to an actual seizure of the lands, as in case of goods. The statute was intended to regulate the claim of the sheriff to poundage in cases of executions for the same debt into different counties; and therefore, the expression "*seized*" can only mean something done by the sheriff which would confer upon him the legal right to complete the execution. It is nowhere, that I can discern, defined what is an act done by the sheriff, in the case of an execution against lands, which is a beginning of the execution by him; and as it appears to me, under the existing

state of the law, that is a question which must depend upon the facts of each particular case. According to my view of the law, derived from the wording of the different statutes taken in connection with the then existing mode of executing writs against the different species of property, I think it was contemplated that the sheriff should have a right to proceed to the sale of lands by publishing an advertisement if that were done within the current time of the writ without his having done any other act; and if that proceeding be an inception of execution on the part of the sheriff, I do not see but that there may be others which will have the same effect. The plaintiff in an execution may be desirous that the lands should not immediately be exposed to sale, and he may, I apprehend, delay the advertising longer than the period of the twelve months, for various reasons, without being prejudiced; but in such cases, something would be required to be done which could be considered a beginning of the execution. If a plaintiff could not do so, it would follow that he could not postpone or delay an execution against lands until after the advertisement had actually been put forth; but I do not think it was ever supposed the law was such that the plaintiff was deprived of that power when he deemed it most advantageous to himself to exercise it, or that he must necessarily apply to the debtor for his assent to it.

If there may then be a beginning of the execution otherwise than by an advertisement the question is, whether the facts shewn in this case amount to a legal inception while the sheriff was in office, before the expiration of the writ. In February, 1837, the writ was placed in the sheriff's hands, and in the following July he ceased to be sheriff, and before the expiration of the twelve months he advertised the lands for sale. What the sheriff proved was this—that before he ceased to be sheriff, he, having the execution, went to the defendant in order to obtain a list of his lands for the purpose of executing the writ. He did obtain from him an account of those lands situated out of Hamilton; and the land in Hamilton the sheriff himself was aware of, because the debtor was living upon it, and therefore he inserted it

in his list with the others. The jury have found that the sheriff did this act towards executing the writ before he ceased to be sheriff; and I think it must be held to be a beginning to execute on the part of the sheriff, which should bind the execution debtor. The letters of the lessor of the plaintiff, and his petition to the Bank, are important on this part of the case, in this point of view, namely, that I think they clearly shew that the defendant thought and acted upon the idea, that the late sheriff had done something which entitled him to proceed to sell his lands; and now that we know what that act was which the sheriff did, it only remains to be considered whether the lessor of the plaintiff was right in supposing that the act of the sheriff did legally confer upon him the right to dispose of his lands. I do not see that the sheriff could well have done anything more towards a beginning of the execution, short of making an actual and formal entry upon the lands; and that I think, he was not bound to do. It seems he followed up his first act by publishing an advertisement of the sale before the expiration of the writ, though of course that was done after he ceased to hold office. If he had remained in office, I think the publication of the advertisement would, without any other act done by him, have been an inception of the writ; and it appears to me there may be other modes of beginning an execution against lands besides the publication of the advertisements, and otherwise than by an actual and formal entry upon the lands. As I have remarked, it is impossible to define the different modes; it must depend upon the facts of each particular case, whether the act done does or not amount to a legal inception or beginning to execute the writ. It will be seen that I have endeavored to reason it upon the principle that there is a distinction between what is required to be done upon an execution against goods, and what is required as respects lands. What success I may have in convincing other minds, of course I cannot tell; but to my own mind there does appear to be such a great distinction, that it warrants me, I think, in dropping the word "levying," when applied to lands, and substituting the expression "a beginning of execution,"

which I have done, as equivalent to the expression "seized" or "levied." If I were speaking of executions against goods, I should always enquire what act the sheriff had done which would constitute a levy—that is a taking of the goods; but as respects lands, as there can be no taking in that sense of the word "levy," and as I think the whole scope of our law and the acts of the legislature shew there was a different mode of executing the process against lands, then I think I am warranted in substituting the enquiry into what shall be considered *a beginning of execution* against lands.

The next inquiry is upon the third question I have put. The case of *Doe Hughes v. Jones*, 9 M. & W. 392, decides that it is necessary, in order to fulfil the provisions of the Statute of Frauds, that the sheriff should, upon the sale of a term, execute an instrument in writing assigning it to the purchaser. If that be so as respects terms, it must equally apply to freehold estates. The power of the sheriff must therefore continue until he has executed the conveyance, and does not cease with the sale merely—or, in other words, the sale alone will not confer title upon a purchaser. The sheriff acts only by virtue of a power vested in him by law, and he can only transfer or convey what is actually sold at the time of the sale, and he can convey and transfer nothing else. In this case the jury find expressly that the lands conveyed were sold, so that determines that the lessor of the plaintiff claims no more in this action than was sold by the sheriff at the time he purported to be acting in the fulfilment of his duty. The sheriff could make no conveyance of lands without actually exposing them to sale, and also selling; and if he should sell one lot, thinking he was selling another, he could not convey the one he intended to sell, for there must be a sale of the identical thing conveyed. If a purchaser supposed he was buying much more than the sheriff was actually selling, or if all the audience present thought so as well as the purchaser, the sheriff would have no legal right or authority to make a conveyance of any more lands than he actually sold, no matter what might have been thought on the subject, and no matter how convenient it might be either as obtaining a better price for the

thing sold, or how inconvenient it might be to any person. The act of the sheriff cannot be enlarged in any way for any purpose, either at the time of performing the act of sale, or at any subsequent period. If the lands sought to be recovered in this action were sold (and the jury have said they were) then it only remains to be considered at what time the sheriff may perfect his sale by the conveyance. If the sheriff sells land, and at once makes a perfect conveyance of it, I have no doubt that after that time, as respects that particular matter, he is *functus officio*; but the question here is, whether, after having made a defective deed of the land sold, he can at any future period correct that act, and make it right, and in accordance with the fact. It was impossible to hold the first conveyance of the sheriff to be a proper conveyance of the lands sought to be recovered in this action. By virtue of the process against lands, and the operation of law, the sheriff was placed in the position of having a right to exercise a power, and of actually having a power to sell and dispose of the lands, and to convey them. If he executes this power defectively, can he re-execute it or remedy the defect? It is unnecessary to consider whether, in case of a defective sale, there remains a power of remedying the defect; for in this case such does not exist. The sale was not in any way defective, provided the sheriff had authority to sell, supposing him to have sufficiently began the execution. I see no difference between a sheriff and any other person who has, and is required to execute, a power over real estate, and I am not aware of any authority which holds the sheriff to any particular time in executing the conveyance. One of the earliest cases on the subject of the time of executing a power, and which shews that it may be done at different times, is *Hervey v. Hervey*, Barn, C. C. 103, 1 Atkyns, 561, S. C. That was afterwards followed by *Zouch v. Woolston*, 2 Bur. 1136, 1 W. Bl. 281, S. C. In this last case—I quote from the report in Blackstone—Lord Mansfield says: “Upon this head, of execution of powers, for want of liberal way of thinking, and of making proper distinctions, some of the early cases have been decided so extremely strictly in courts of law, that it has forced courts

of equity to make those determinations which ought to have been made in the legal jurisdiction. It is true, naked powers must be taken strictly, both in courts of law and in equity. Other powers, which are a mode of property, are either merely legal, independent of the Statute of Uses—as, powers of leasing by ecclesiastical persons, by tenant intail, by the crown, &c.—here what is a void execution in law, is void in equity also; or, they are derived from the Statute of Uses. And what is a good execution of such a power in equity ought to be good in law; the whole being derived from equity.” If the sheriff be required to execute a conveyance—and it seems that he is—in order to give the purchaser the full benefit of his purchase, then it seems to me the power must continue with him personally until he has performed it. A defective execution of the power is of course no execution of it, and I cannot bring myself to think that an attempt to execute it deprives the person of all power to accomplish it, when it is found the attempt has failed. If this be a correct mode of reasoning, then it only remains to be considered whether the lapse of time makes any difference. I am not able to see that it does; because if the carrying into effect of execution remains with the person who began it, then the fulfilment of the acts necessary to complete execution are personal, as distinguished from merely official acts. I see no reason for holding that such personal act is to be limited to any particular time. So far as the debtor was concerned, everything had been done at the conclusion of the sale that could be—that is, I mean, as between the debtor and the purchaser—except the last act, which was to divest the title from the debtor and vest in the purchaser. I see no cause for complaint, on the part of the debtor, that he was allowed to retain the dry legal estate in him for a period of ten years longer than there was any occasion for; and I know of no will or authority which would prevent a person executing the office of sheriff, from fulfilling a power which appears to me personal, and must remain with the person till fully performed, within any distance of time within which other persons have not acquired rights by lapse of time or by

statute, which would operate against the claimant under the power.

For these reasons I think the rule for setting aside the verdict for the plaintiff should be discharged.

DRAPER, J., concurred.

Rule discharged.

THE QUEEN EX REL. METCALFE V. SMART.

Contested election—Summons irregularly issued, effect of, as to subsequent proceedings—Qualification for town councillors under 12 Vic. ch. 81., sec. 65.

A summons having been obtained for the trial of a contested election, the relator, finding his proceedings irregular, notified the defendant not to appear, and that it was his intention to proceed *de novo*.

Held, The objection urged against the election being a material one, that the relator was not precluded from a second application by his first ineffectual proceeding.

Under 12 Vic. ch. 81, sec. 65, as amended by 14 & 15 Vic., ch. 109, sched. A, part 12, candidates for town councillors must be not only assessable but assessed for the necessary amount of property.

On the 13th of January, 1852, this relator obtained a writ of summons returnable the eighth day after service, calling on the defendant Smart to shew by what authority he claimed to act as councillor for ward No. 2, in the town of Port Hope, for the year commencing from the third Monday of January, 1852; and why Metcalfe should not be declared duly elected.

The grounds in the statement on which the summons was obtained were,

1st. That Smart is not, and at the time of election was not rated in the collector's roll for Port Hope, or on the collector's roll of any of the wards thereof, for the year next before that in which the election was holden, either as a freeholder, or householder of Port Hope; nor as seized or possessed for one year or upwards of any real property as proprietor, or tenant or otherwise, either in fee or freehold, within the said town or elsewhere.

2nd. That at the time of election Smart was not rated on the said rolls, or either of them, for any real property whatsoever.

On the 30th of January the relator applied for and obtained a second summons, filing a statement which contained the same two grounds as were inserted in the other

statement, with a third allegation alleging that Metcalfe had the greatest number of votes recorded for him next after Smart, and ought to have been declared duly elected instead of Smart; the electors having been duly informed that the said Smart was not qualified, and that their votes in his favor would be thrown away.

The relator's affidavit stated, in substance, that the election was held on the 5th and 6th of January, 1852; that Smart and he (Metcalfe), and four others were duly nominated as candidates; that, before the polling began, a question arose respecting Smart's qualification, which was discussed at length by Smart and others in the presence of the electors; that the poll was closed in the afternoon of the 6th of January, with the following result: votes for Smith 53; Robinson 46; Smart 44; Metcalfe 39; Gallagher 31, and Ward 27; that Smart, at the time of the election, was not rated on the collector's roll of the town, or of any ward thereof, for the year next preceding the election, for any real property; and was not, and is not rated as a householder, or freeholder of the town, as proprietor, or tenant, or otherwise; on which ground he was objected to at the opening of the election; that the returning officer declared that Smith, Robinson, and Smart, had received the largest number of votes, and were consequently elected as councillors for ward No. 2.

Smart made affidavit that, at the time of election, he was and still is possessed of real property, as tenant thereof, to the amount of £50 per annum; that the property was rated on the collector's roll for ward No. 1 in Port Hope, for the year next before the election, at £54 per annum; that the taxes have been paid to the collector; that he holds the property for two years under a lease made on the 13th of July, 1850, to himself and his partners; that his partners afterwards assigned to him; and that he has been in possession from August, 1850, continually, and has paid the rent; that the property—being a town lot, shop and two store-houses—was rated on the collector's roll of Port Hope for £184 personal property and income; that, when called on for a list of his property, he proposed to give in these

leased premises, but was told they had already been given in by the agent of the lessor: that he was liable for the taxes by the terms of the lease, but thinking it of no consequence how the premises were assessed, he paid no further attention to it.

It was sworn, on affidavit of the relator's attorney, that from not being aware of the rules of this court passed in Michaelmas term, 1850, respecting proceedings of this nature, he found afterwards that his papers were incorrect, and advised the relator to abandon the summons, and commence *de novo*: that notice was served on the defendant not to appear to the first summons, for that it had been abandoned for informality, and that the relator intended to proceed *de novo*.

On the 10th of February, 1852, Mr. Justice Sullivan heard the parties, and on the 24th of February adjudged,

1st, That the relator had an interest in the election.

2nd & 3rd, That Smart was not rated, as the relator complained.

4th, That he was therefore not qualified; and that the relator should have been returned, having the next greatest number of votes; and the electors having been informed that Smart was not qualified, and that the votes in his favor would be thrown away. And the proper and ordinary directions were given as to costs, &c.

Cameron, Q. C., obtained a rule *nisi* on the relator to shew cause why the judgment given in this case by Mr. Justice Sullivan should not be set aside, on the grounds that the writ of summons on which he proceeded was irregularly granted, after a former writ had been issued at the instance of the same relator and had been abandoned by him; and that no sufficient ground was shewn for ousting the defendant Smart; and that Smart was duly qualified to be elected; and that the election only should be set aside, and that the relator should not be declared duly elected. He cited, Whally v. Bramwell, 20 L. J. (Q. B.) 53; The Queen v. Dixon, 15 Q. B. R. 33.

Vankoughnet, Q. C. shewed cause, and cited, The King v. Bond, 3 T. R. 767; The King v. Slythe, 6 B. & C. 244; Jeyes v. Hay, 1 M. & G. 390.

ROBINSON, C. J., delivered the judgment of the court.

We see no sufficient ground for reversing Mr. Justice Sullivan's judgment. The exception taken to the return of Mr. Smart was of a substantial character, if supported—namely, that he was not a person qualified to be elected. It did not turn upon any such questions of regularity in the conduct of the election as are sometimes rather vexatiously raised. The relator's attorney finding that he was incorrect in his proceedings, in consequence of his not being aware of a late rule of court that had been passed, abandoned his proceedings, and gave notice to the defendant that he had done so. We think the learned judge properly exercised his discretion in not holding the relator precluded by his ineffectual proceeding from questioning the legality of the election on so material a ground as he has done.

We are also of opinion that Mr. Smart, not being in fact assessed on the roll, was not eligible, though he may have supposed he was, and though he possessed property sufficient to confer the qualification. The 65th clause of 12 Vic., ch. 81, as amended by 14 & 15 Vic., ch. 109, sched. A, part 12, appears to make it indispensable that the candidate should not only be assessable, but be assessed for the necessary amount of property. It is certain that he was not on the roll for any property, either as freeholder or householder, that would qualify him but was only assessed in a small amount for annual income: and as his want of qualification was questioned, and publicly discussed in presence of the electors at the election, when it began, we consider that it was proper on the evidence to seat the relator.

Rule discharged with costs.

THE CANADA COMPANY V. THE MUNICIPAL COUNCIL OF THE
COUNTY OF MIDDLESEX.

By-law for payment of a debt must contain the rate to be levied, and specify the debt to be paid.

A by-law for payment of a debt must contain on the face of it the rate authorized to be levied for making up the sum granted.

Such by-law is illegal if it direct a gross sum to be raised for the payment of the current general expenses of the county, and the liquidation of the debt due—not stating what debt or of what amount.

Whether the provisions of 4 & 5 Vic. ch. 10, sec. 41, are to be regarded as applicable to by-laws passed under 12 Vic. ch. 81, or whether the court must determine on their validity according to other statutes in force, and the common law—*Quere.*

Cameron, Q. C., moved to quash a by-law passed by the Municipal Council of the County of Middlesex on the 1st of February, 1850, intituled, “By-law to provide for the current general expenses of, and the liquidation of the debt due by, the County of Middlesex.” It recited that it was “expedient to provide for the payment of the current general expenses of, and the liquidation of the debt due by, the County of Middlesex,” and it enacted that fifteen hundred pounds should be raised and levied on all the ratable property in the county, for the above mentioned purposes, for that year (1850): that the said sum should be apportioned by the county clerk, and that the rates so assessed should be collected, recovered, and paid over to the county treasurer, by the township collectors, in the same manner and under the same provisions as rates had theretofore been collected. The objections taken against this by-law were:

First. That there was no power in the Council to levy a rate for the current general expenses of the county, without some particular specification of what those expenses were.

Secondly. That the amount due for the debt of the county should have been separately and distinctly stated.

Thirdly. That the rate in the pound, or the rate per acre in respect to land, should have been specified in the by-law, and not left to be fixed by the clerk.

Fourthly. That as regards land in the county, the rate could not legally be assessed as a rate in the pound, but must be by a rate in the acre. And,

Fifthly. That a special rate should have been fixed in the by-laws, over and above all other rates, for the payment of

the sum limited in the law, as required by the 176th and 177th clauses of the Municipal Council Act 12 Vic. ch. 81.

Wilson, Q. C., shewed cause, and cited *Doe McGill v. Langton*, 9 U. C. R. 91; *Hawkins v. The Municipal Council of Huron, Perth and Bruce*, 3 U. C. R. (C. P.) 72; *Curtis v. The Kent Waterworks Co.*, 7 B. & C. 341.

ROBINSON, C. J., delivered the judgment of the court.

The result of the consideration which we have given to these objections is, that this by-law is illegal, and that the rule for quashing it must therefore be made absolute, with costs.

Upon reference to the learned judges in the Court of Common Pleas, we did not find that the same facts had in any case come under their consideration; but there are several grounds on which we are of opinion that this by-law cannot be maintained. It is to be examined in reference to the statute 12 Vic., ch. 81, under the authority of which it was passed. The legislature has by that act repealed the 4th and 5th Vic., ch. 10, totally; and, consequently, we cannot apply any provision of the 4th and 5th Victoria as affecting the question of the validity of any by-law passed under this new statute.

The provision of the new act—12 Vic., ch. 81—bearing on the subject of by-laws of counties, is the 41st clause, part 22, which merely gives to the county councils authority “for raising, levying, collecting, and appropriating such monies as may be required for all or any of the purposes spoken of in that act, by means of a rate or rates to be assessed equally on the whole rateable property of the county liable to assessment, according to any law which shall be in force in Upper Canada concerning rates and assessments.”

There is nothing in this act corresponding with the 41st clause of 4 and 5 Vic., ch. 10; and it is to be considered whether we are to infer from that omission that the legislature meant by the 155th and 156th clauses of the 12th Vic., ch. 81, to give to the courts a general authority to exact conditions to which by-laws must conform; or that

the courts are left to determine their validity by such rules as they may find laid down in the decisions of courts upon by-laws passed by corporate bodies in England, and without reference to what the legislature of this province had required in express terms by the former act, 4 and 5 Vic. ch. 10; in which case they might be expected to hold all by-laws to be valid which are not repugnant to any thing contained in 12 Vic., ch. 81, and the other statutes in force, or the common law.

It seems rather singular that the safeguards which the legislature had provided in the statute 4 and 5 Vic. ch. 10, are dropped in the late act; and I confess I hardly know what inference we are to draw from that: whether the legislature deemed them unimportant, and were content to dispense with them; or whether they assumed that the courts could, in their discretion, treat the absence of such provisions in the by-laws to be hereafter passed as defects, although the recent statute imposes no such conditions; or whether they were content to allow such by-laws to stand or fall by the principles of the common law.

All that the 155th clause provides is, that we are to determine whether any by-law brought before us "appears to be in whole or in part illegal." Are we then to entertain considerations of what shall appear to us reasonable, as constituting a test of validity, to the same extent as such considerations have been entertained in England in deciding upon the by-laws of corporate bodies very inferior in importance to some of these municipal bodies?

When we consider what may in some cases be the inconvenience produced by quashing by-laws such as these councils have a general authority to pass, especially after they have been extensively acted upon, I confess I think it is to be regretted that some restrictions were not imposed by positive enactment in this latter statute, as they had been in the preceding; and that at least we had been able to discern whether the legislature thought that the securities against rash or loose legislation which the former statute contained were unnecessary, and should therefore be dis-

pensed with; or whether they imagined that the same security would be found in the controlling power which the courts could properly exercise without any rules being prescribed in the statute for their guidance.

Looking at the statute, however, as it stands, and considering the principles which have governed the courts in determining upon the validity of by-laws, we hold this by-law to be illegal on two grounds :

First. Because we think it indispensable that the by-law should contain on the face of it the rate authorized to be levied for making up the sum granted; that it should be fixed by the council themselves in their by-law, and not left to be declared by the clerk, upon a computation to be made by him after the by-law had been passed.

It may be said that if the clerk makes his calculation correctly, it must come to the same thing; but he may possibly not make an accurate calculation, and then questions might be raised whether the rate was legal and the ratepayers could not tell whether the rate was legal or not till they had made the calculation; and it might be impossible for the clerk to carry the direction implicitly into effect without making a most inconvenient fraction of a rate, for he would have no discretion to direct a penny more or less to be levied than just what would make up the sum. We conceive that the council are bound themselves to ascertain what rate it will be proper to impose for rising the sum, and to declare it in their by-law.

We are also of opinion that this by-law is illegal, in not specifying separately the amount of the debt, but directing that the gross sum (fifteen hundred pounds) shall be raised for the payment of the current general expenses of the county, and the liquidation of the debt due—not stating what debt, or what amount. When the ratepayers had paid up the whole fifteen hundred pounds to be levied upon this by-law, they would not know what debt they had paid, or what portion of the debts of the county or of any debt. Under the pretence of paying off debts, a large sum might be levied, which might afterwards be absorbed in current expenses, leaving the debt unpaid.

The 176th, 177th, and 182nd clauses appear to us to require that the debt should be specified, at least so far as to shew what amount of debt is intended to be provided for; otherwise, the intention of the legislature, as expressed in the 182nd clause of the act, could not be carried out.

Rule absolute.

THE EARL OF ELGIN V. CROSBY.

Bond for administration of intestate's effects—Pleas to action on.

Debt on an administration bond—breaches assigned in the declaration.

Pleas—1. That *after* the 1st of November 1833 (the day named in the condition on which the administrators were to render their account), to wit, on, &c., and as soon as they reasonably could, the administrators rendered a just and full account, which was allowed by the Judge of the Surrogate Court. 2. Performance generally. 3. That on the 1st of November, 1833, there was no sitting of the Surrogate Court to which the administrators could have rendered their account.

Held, on demurrer—Pleas bad.

Debt on an administration bond, dated the 27th of November, 1832, in the usual form, conditioned for the due administration of the effects of one Aldridge Wells, an intestate. One of the conditions was, that the administrators should make a true and just account of their administration at or before the 1st of November next ensuing the date of the bond.

It was assigned as a breach, that they did not make such account at or before the 1st of November, 1833, or at any time before or since.

The defendant (one of the sureties in the bond) pleaded—
7. That after the said 1st of November, 1833, and as soon as they reasonably could, they (the administrators) made and exhibited a just and full account, &c., which was allowed by the Judge of the Surrogate Court, acting in the place and stead of the plaintiff, and was accepted in full discharge of the bond; and that, by such allowance and acceptance, they became and were released from their bond, and from the breach thereof, and from all damages, &c.

10. Performance, generally.

12. That on the 1st of November, 1833, there was no sitting of the Surrogate Court in the bond and declaration

mentioned, to which the administrators could have rendered their account, according to law, and according to the intent of the condition,

Demurrer to each of these pleas.

Leith for the demurrer.

D. G. Miller, contra, cited 2 Saund. 409, notes 2 and 3 ; Archbishop of Canterbury v. Wills. 1 Salk. 315 ; Archbishop of Canterbury v. Robertson, 1 Cr. & M. 690 ; 3 Tyrwh. 390, S. C.

ROBINSON, C. J., delivered the judgment of the court.

Whatever may be the control of this court to be exercised in another manner over proceedings upon administration bonds, the pleadings in such actions must be subject to the same rules as prevail in other actions upon specialties. The case of the Archbishop of Canterbury v. House, Cowper, 141, and the few other cases connected with that subject which are commented upon in the works of Williams on Executors, pages 333, 1263, explain at whose instance such bonds may be put in suit, and under what circumstances ; and what control the courts will exercise in order to confine the remedy upon them to the purposes for which they were intended. But these are matters apart from the technical rules of pleading, which must be applied in these actions as well as in others. While the suit is pending we must assume it to have been properly brought, in the absence of any complaint to the contrary.

The 7th plea, which is demurred to, we think is insufficient. It confesses a breach but does not avoid it. Whatever effect the accounting satisfactorily after the day named in the condition might have on the amount of damages, it can be no bar to the action at common law, or it would have been unnecessary to pass the statute which makes the plea of *solvit post diem* a good defence ; and there is nothing in our Probate Act, or in this particular breach of the law, that we can say takes this case out of the general rule.

As to the 10th plea : it is clear that general performance cannot be pleaded as an answer to such breaches as are assigned in this declaration. The defendant should

have traversed the breaches specially assigned. The authority cited from 2 Saunders, 409, is not in point, for there the plaintiff had not yet assigned any breaches, but had merely sued in common form upon the bond.

The 12th plea is an answer to the same breach, viz., the not making and exhibiting an account. Notwithstanding the defence advanced, the condition might still have been literally performed; for the undertaking was, that the administrators should exhibit their account on or before the 1st of November, 1833; and it is not alleged that there was no court sitting before, supposing that would constitute a good defence. This plea does not state that the administrators were there on the 1st of November, ready to account, &c. Our statute appoints certain stated times for the sitting of the court in each year, of which the defendants were bound to take notice, and if the administrators could only "make a true and just account of their administration" in open court, they were bound to see that done at some time on or before the 1st of November, 1833, when it could be done. And if this case, neither in regard to the facts, nor on account of anything in the form of the plea, could be distinguished from the case of the Archbishop of Canterbury v. Wills, 1 Salk. 316, in which Lord Chief Justice Holt held that the administrator must account in court, and that if he comes at the day, and no court is held, he shall be excused it would still require to be considered that in the case of the Archbishop of Canterbury v. Robertson, 3 Tyr. 390, doubts seem to be intimated of the correctness of what is there laid down; but trying this plea by the test of the case of the Archbishop of Canterbury v. Wills, as it is reported in 1 Salk. 172, it cannot be sustained.

Judgment for the plaintiff.

THE QUEEN V. SMITH ET AL.

An indictment cannot be removed by *certiorari* from the assizes after judgment pronounced, for the purpose of applying for a new trial.

This was the case of indictment for nuisance, tried at the last assizes at Toronto, in stopping up a road.

Wilson Q. C., moved for a rule *nisi* for a *certiorari*, and to stay the entry of judgment. The object of this motion was to obtain a new trial, in consequence of an alleged misconduct of the jury at the trial. He referred to Goldcut v. Beagin, 11 Jur. 544; Walker v. Gann, 7 D. & R. 769; Catlin v. Barker, 11 Jur. 1105; Regina v. Chasemore, 12 Jur. 11; Rex v. The Inhabitants of Wandsworth, 1 B. Al. 63; Rex v. Sutton, 5 B. & Ad. 52.

Cur. adv. vult.

BURNS, J., now delivered the judgment of the court.

The defendant's object in asking for the *certiorari*, is to enable themselves, after the proceedings shall have been removed, to move for a new trial, in consequence of the alleged misconduct of the jury. Whether the conduct of the jury, in respect to what is stated of one of them during the progress of trial, could be so far impeached as to warrant the court in now interposing to relieve the defendants against the verdict, need not be considered. Judgment has been pronounced upon the verdict, and it is now too late to interfere. The proper course for the defendants to have taken was, to have applied to the learned Chief Justice to stay the judgment, in order to enable the defendants to apply to this court; and no doubt, if they had made such application, it would have received due and careful consideration.

In England, the effect of the 9th section of statute 11, George IV., and 1 William IV. chapter 70, is that, when the judgment is pronounced at *Nisi Prius*, it shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to shew cause why a new trial should not be had, or the judgment amended. We have no such provision in our criminal law, and we are here upon the same footing that the law stood in England in that respect previous to the year 1830. The general rule was, that no motion for a new trial could be made after a motion in arrest of judgment; and the proper time to arrest the judgment was before the sentence pronounced. If sentence were once pronounced, no matter how fatal a defect might

be discovered, judgment could not be arrested, but the party must be left to his writ of error—2 Salk. 647; 1 Bur. 434. Rex. v. Lookup, 3 Bur. 1901. If no motion can be made to arrest the judgment, it follows that no new trial can be granted.—The King v. The Justices of Leicestershire, 1 M & S. 442.

In accordance with that view it is, that after judgment pronounced no writ of *certiorari* lies on the part of the defendants to remove the proceedings; and the only way of removing them is by writ of error.—Rex. v. The Inhabitants of Pennegoes, 1 B. & C. 142.

I take the law to be so plain upon this subject that it admits of no argument of what it in truth is, and therefore the rule to shew cause why a *certiorari* should not issue must be refused.

Rule refused.

JOHNSTON V. REESOR, JOHNSTON ET AL.

Highway—Right of Municipal Council to stop up, and to convey—Pleading.

To an action for obstructing a highway, the defendant pleaded, admitting that there was once a legally established highway through the *locus in quo*, but averring that before the obstruction complained of it had ceased to be a highway, in consequence of certain proceedings taken by the municipal council of the township, and which were set out in the plea.

Held, First—as to matters stated as inducement in such plea, that it was unnecessary to negative the fact of the road passing through ordnance property, or that it was within the limits of any village, town, or city—and that the municipal council was sufficiently designated as the municipality.

Secondly—That under 12 Vic. ch. 81, the municipal council might convey the highway as soon as it was abolished by their enactment; and that it was not necessary for them to enclose it so as to prevent persons from passing.

Thirdly—That the council might stop up the road in this case, though it was not in contemplation to substitute another for it.

The plaintiff sued for a special damage occasioned to him by the defendants having unlawfully obstructed, as he alleged, a certain common and public highway.

The defence set up was, that the *locus in quo*, was not, and is not a highway; but instead of simply traversing the fact of its being a highway, the defendants pleaded a long special plea, in which they admitted that it was once a legally established road; and they set out certain proceed-

ings of the Municipal council of the township for closing up this road, in consequence of which proceedings they averred that it ceased to be a highway before the obstruction complained of.

The plea was specially demurred to. The grounds of demurrer sufficiently appear in the judgment of the court.

Cameron, Q. C., for the demurrer, cited *DePonthieu v. Pennyfeather*, 1 Marsh. 261.

Eccles, contra, with whom was *Bell*, cited *Dennis v. Hughes et al.*, 8 U. C. R. 444; *Simpson v. Ready*, 12 M. & W. 736; *Mayor of Salford v. Ackers*, 16 M. & W. 85.

ROBINSON, C. J., delivered the judgment of the court.

Any want of certainty or other informality in the statement of mere matter of inducement, might be of no consequence; but if, by the defendants' own shewing in their plea, the proceedings on which they rely had not the effect of abolishing the highway which they admit to have existed, that, of course, would be fatal to the defence.

We see no such fatal objection, however, in this plea. Admitting it to be true that the council had passed an irregular resolution, or had even made an objectionable and invalid by-law for the purpose of dispensing with this road, as being no longer necessary; that fact would not render less valid the by-law, which they did afterwards pass in a regular manner, and after giving due notice.

We think it is no objection that the plea does not negative the road passing through ordnance property; or its being within the limits of any village, town, or city; and that the plea does sufficiently shew that the by-law for closing the road was passed by the municipal corporation, or, as the plea alleges, by "the municipality," which is a term used in many instances by the legislature as equivalent to "municipal corporations." Considering that this is merely matter of inducement, and unnecessary inducement too, the plea cannot be held insufficient on the ground of that objection.

The next exception taken is, that the corporation could not convey the highway to the defendant Johnston till it had been actually stopped up; but there can be nothing in that; the statute does not require the corporation to do more

than close or abolish the highway by their enactment. They are not required to fence it in, or to place any physical obstruction in the way of persons passing. They only put an end to the right of using it, and consequently to all obligation on the part of any person to respect it as a highway. And the conveying away the former line of road, where they have authority to do so, is a distinct matter altogether, and not necessary to the extinction of the right of way.

The remaining objection, I suppose, was the one principally relied on—namely, that the council could not convey the land which had formed the old road, unless some other road were laid out as a substitute for it. Whether they could convey away the old road to any one, however, is not the question; but whether they could provide that it should be no longer a highway, and whether they have done so. Whether the soil has become the property of Johnston is immaterial. The question is whether the plaintiff had, at the time he found it enclosed, any right to use it as a highway. If not, he has no right of action. For anything that appears in the plea, this was a case in which the former road should be conveyed first to the owner of the adjoining land, if he would take it, and if not, then to any other purchaser; but that seems to be a consideration not necessary to be entertained in determining on the validity of this plea.

The defendants appear to question whether the municipal council could legally shut up this road, except for the purpose and with a view of substituting some other line of road in its place; but we see no difficulty of that kind. Here was a road first allowed at an early period as a mere accommodation to the immediate neighbours, for enabling them to pass through private property by a short road from one concession to another, instead of going round by the nearest public allowance, where the ground might have been wet or unfavourable.

It may be very reasonable afterwards, when the township becomes cleared and populous, and roads can be made more easily, to relieve the proprietor of the land from the

disadvantage of having the thoroughfare through his property, and to leave only the public allowance. The 31st clause of 12th Vic. ch. 81, part 10; and the 187th, 188th, 192nd and 193rd clauses seem to be all that apply materially to this subject, and we see nothing in them to occasion us to doubt that the council could legally stop up this road.

For these reasons we give judgment for the defendants on this demurrer.

Judgment for defendants on demurrer.

IN RE DENNIE ET AL. APPLYING FOR PARTITION.

Application for partition—2 W. IV. ch. 35, sec. 6.

Where the property was not indivisible in its nature, consisting of several lots of land, but the freeholders returned that it was desirable that no division should take place, but that the whole should be taken by one of the parties entitled; or, otherwise, sold; there being more than eighteen claimants, the court approved of the return.

Application for a writ of partition under 2 W. IV. ch. 35.

Phillpotts for the applicants.

The facts of the case appear in the judgment.

ROBINSON, C. J.—The three freeholders have in this case reported that it is desirable the lands should be valued and taken by some one of the parties entitled who would agree to pay or secure to the others their just share of the value; or, otherwise, that the lands shall be sold and the proceeds divided; and we are moved to approve of this report.

The property is not indivisible in its nature, like a mill, &c. It consists of four distinct lots of land in different townships, valued altogether by the freeholders at £1100—but there are eighteen shares.

We have now to say whether we approve of the course recommended by the freeholders, and we think we may approve of it, though it has seemed to us to require some consideration. We can properly say under the circumstances, that we are satisfied “the estate cannot be divided according to the demand of the writ, without prejudice to or spoiling the whole.” These are the words of the 6th clause of the act. The legislature, no doubt, had chiefly in view the case of a house, mill, or other property, which could not be divided; but they use the word “estates,” shewing that

they extended the provision to cases where there might be more than one property. In this instance there are over eighteen claimants of six or seven lots of land, valued in the whole at 1100*l*. We can see no reason for supposing that the estates could not without prejudice to the claimants, be divided into so many parts, and have no doubt that the freeholders have exercised a sound discretion.

We therefore approve of their return.

TRINITY TERM, 16 VIC.

Present :

THE HON. JOHN BEVERLEY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

NOTMAN V. CROOKS.

Statute of Limitations—Whether plaintiff relieved from, by issuing of first writ, though defendant not served?—Right of plaintiff to credit a set-off against items barred—Effect of omission of proviso in 13 & 14 Vic., ch. 6—Retrospective operation of that act.

Where an action for services rendered was commenced by writ of summons, which was succeeded by an *alias* and a *pluries* writ, each of which was placed in the sheriff's hands, but not served or intended to be served, and the defendant was afterwards served with an *alias pluries* summons, it was held at *Nisi Prius* that the Statute of Limitations would bar only such demands as had accrued six years before the issuing of the *first* process.

The plaintiff wrote to the defendant, who had a demand against one C, saying that C had asked him to settle the claim with the defendant and requested him, therefore, to charge it to his (the plaintiff's) account. It was not proved that any account had been rendered by the defendant in which he took credit to himself for this as a payment on any particular account.

Held, That this must be considered merely as an item of set-off, and not as a payment; and therefore, that the plaintiff was not entitled to credit it as a payment of that part of his demand which was barred by the statute.

Seemle, That the omission in our act 13 & 14 Vic. ch. 61, sec. 1, of the proviso which is contained in sec. 1 of the English stat. 9 Geo. IV., ch. 14, will not operate to take away from the fact of payment any effect which it would have had before.

The statute 13 & 14 Vic. ch. 61, has a retrospective effect.

Assumpsit on common counts for services as attorney, &c., money paid, &c., money received, &c.

Pleas—1, Non-assumpsit. 2, Payment. 3, *Actio non accrevit infra sex annos*. 4, Set-off. Issues thereon.

At the trial, before Draper, J., at Hamilton, it appeared that the plaintiff's account for services rendered, and disbursements made on the defendant's account, went back as far as 1827.

Some services were rendered within a recent period. In a conversation with defendant, in March, 1852, he said he had not had time to go into the accounts—which he had been often pressed to do—and said they must “jump them.”

The first summons issued on the 31st of December, 1850, to be served within four calendar months from date, and was filed on the 31st of May, 1852, returned “*non est inventus*.”

An *alias* writ issued on the 30th of April, 1851, to be served within four calendar months, and was filed returned, “*non est inventus*,” on the 31st of May, 1852.

A *pluries* summons issued on the 29th of September, 1851, to be served within four months, and was filed with return of “*non est inventus*” on the 31st of May, 1852.

An *alias pluries* summons issued on the 28th of February, 1852, was served on the 10th of April, 1852, and was returned and filed on the 31st of May, 1852.

None of the previous writs were served. It was proved that they had been put into the sheriff's hands, but not in order to be served; and no copy of any but the last was delivered to the sheriff.

The first writ was put into the sheriff's hands on the 30th of April, 1851, when the second was sued out not before. At what time the second and third were given to the sheriff was not shewn.

The learned judge held for the time (but reserving leave to the defendant to move for any reduction of the verdict) that the Statute of Limitations would bar only such demands as had accrued six years before the 31st of December, 1850, when the first process was taken out. The defendant contended, that the process not having been regularly continued down, and the earlier writs having been neither served nor intended to be served, the plaintiff could have no benefit, as regarded the Statute of Limitations, from the issuing of the

first process. It appeared at the close of the case that, reckoning back six years from the 31st of December, 1850, and deducting a payment proved by the defendant, the plaintiff had established a claim to 6*l.* 19*s.* 7*d.* for items not barred.

The plaintiff, on the other hand, contended, that the evidence shewed him entitled to a verdict for 19*l.* 17*s.* 11*d.* for that he had a right to appropriate the payment that was proved to the reduction of items that were barred by the statute; and was not bound to allow it as a credit against the 19*l.* 17*s.* 11*d.*, which would reduce the verdict to 6*l.* 19*s.* 7*d.*

The defendant contended that the six years must be reckoned back from the time of that process sued out which was served—namely, from the 28th of February, 1852—and not from the 31st of December, 1850; and that the evidence shewed no demand within that period, at least none that would not be overbalanced by items to which he was entitled upon the evidence, and so that a verdict should be entered in his favour.

What the plaintiff relied upon as being a payment made by the defendant, and claimed a right to set-off against the old items in his account, rather than allow it to go against 19*l.* 17*s.* 11*d.*, which was not barred, was a transaction of this nature:—The defendant had a demand against one Chisholm, for lumber sold and delivered; and on the 16th of August, 1849, the plaintiff wrote to the defendant as follows—“You have an account against Mr. Chisholm of 13*l.* 2*s.* 4*d.* for lumber; he has requested that I would arrange it with you. I shall feel much obliged if you will charge it to my account for the present, not yet having ascertained how financial matters between Mr. Chisholm and myself stand.”

There was no proof that defendant had done more than tacitly agree to this. No account had been ever rendered by the defendant, in which he took credit to himself for this as a payment on any particular account; it stood on the common footing of a direction by the plaintiff to charge the same to him, not as connected with any particular account or portion of his account.

A verdict was given for the plaintiff for 6*l.* 19*s.* 7*d.*

Cross rules were obtained on the leave reserved—viz., by the plaintiff on the defendant to shew cause why there should not be a new trial on the law and evidence, and for misdirection; or the verdict be increased to 19*l.* 17*s.* 11*d.*

And by the defendant to shew cause why a verdict should not be entered in his favour.

Notman (the plaintiff) cited *Cottam v. Partridge*, 4 M. & G. 271; *Martindale v. Falkner*, 2 C. B. 715; *Harris v. Osbourne*, 2 C. R. & M. 629; 4 Tyr. 445 S. C.; *Williams v. Roberts*, 1 Cr. M. & R. 676; *Hilliard v. Lenard*, M. & M. 297; *Fellowes v. Williamson*, M. & M. 306; *Smith v. Forty*, 4 C. & P. 126; *Amner v. Cattell*, 5 Bing. 208; *Williams v. Griffiths*, 2 Cr. M. & R. 45; *Waters v. Tompkins*, Cr. M. & R. 723; *Pritchard v. Bagshaw*, 15 Jur. 730, S. C. 20 L. J. (C. P.) 161; *Medlicott v. Hunter*, 5 Ex. 34; 7 D. & L., 241, S. C.

Cameron, Q. C., contra, cited, *Walker v. Collick*, 4 Ex. 171; 18 L. J. (Ex.) 387, S. C.; 7 D. & L. 225, S. C.

ROBINSON, C. J., delivered the judgment of the court.

It does not appear in any point of view material to determine whether the plaintiff in reckoning the six years, can or can not have the benefit of his first process—claiming to have that treated, for this purpose, as the commencement of this action; because, whether we take the 31st of December, 1850, the time of issuing the first writ, or the 28th of February, 1852, the time of issuing the last writ, which was the only one attempted or intended to be served, the effect will be the same. The amount of 19*l.* 17*s.* 11*d.* is composed of charges all made for services rendered clearly within six years before February, 1852, and no part of that sum, therefore, is in any view barred by the Statute. That has been reduced to the present verdict, 6*l.* 19*s.* 7*d.*, by giving credit to the defendant for a sum due to him by a third party, which the plaintiff, in 1849, assumed to pay.

The plaintiff contends that he can apply this credit towards the discharge of so much of his demand as is barred by the statute, and thus recover the 19*l.* 17*s.* 11*d.* without reduction. If the credit in question, a sum of 13*l.*

and upwards, had been a payment made on account of that portion of the plaintiff's demand which is barred by the statute, then the plaintiff would be in a situation to claim the benefit of the effect of such payment in taking his case out of the statute, and we should have to consider whether our statute 13 & 14 Vic., ch. 61, sec. 1, places the law on the same footing, in regard to the effect of such payment, as the English statute, 9 Geo. IV., ch. 14, sec. 1. In our act the following proviso is not contained, which forms part of the English statute: "provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest, made by any person whatsoever." The omission may have been accidental. I do not suppose that the intention was to deny to the fact of payment the effect which had before been given to it; because, in our statute, and in the same cause, when it speaks of joint contractors, there is an express saving to the plaintiff of a right to recover against any one of such contractors; when by reason of any written acknowledgment, or by reason of any payment of any principal or interest, the case as against him may be taken out of the statute; though as to the other defendants the plaintiff might be barred. I only notice this variance between the two statutes for fear it might escape attention on some future occasion: I take it to be immaterial as respects the present case, where the sum to be credited was not a payment expressly made on account of an old debt, as in *Evans v. Davies*, 4 A. & E. 840; and was, indeed, not a payment at all, but a mere item of set-off. If it had been a payment, and made without any direction as to its appropriation, then the case of *Mills v. Fowkes*, 5 Bing. N. C. 455, and that class of cases, would apply in the plaintiff's favour. This is merely an item of set off. There is nothing in the evidence to bring this case within the principle of *Hooper v. Stephens*, 4 A. & E. 71, where it was held that the delivery of goods may operate as a payment to take a case out of the statute, where the goods were expressly received in reduction of the amount which might otherwise have been barred. This stands like any ordinary item of set-off. The

plaintiff must first shew his right to recover, and then against his ascertained demand we are to place the set-off proved ; otherwise, a person having a stale demand against a merchant or tradesman would have the means of reviving it, in effect, by going as any other customer would, and purchasing an article or giving an order.

Then as we think the plaintiff was not entitled to recover more than the 19*l.* 17*s.* 11*d.* after deducting the set-off, the verdict is in that respect right ; and we see no ground for disturbing it at the instance of the defendant.

As regard's the plaintiff's rule, I will only add, that we consider it quite plain on the authority of *Towler v. Chatterton*, 6 Bing. 258, and subsequent cases, that we must hold our statute 13 & 14 Vic., ch. 61, to apply to this case, though the transactions occurred before its passing ; and that if (which I do not by any means assert) we could otherwise have held that the latter items of the plaintiff's account would draw the others after them, so as take all out of the statute, or all the charges connected with certain suits, we cannot now, since the statute, act on that principle. I do not apply this remark to any case in which some charges for services in the progress of a suit may have been within six years, and others not. The evidence did not shew this to be one of that description.

We are of opinion that both rules must be discharged, and the verdict be allowed to stand as it is.

Rules discharged.

WINTER V. MIXER ET AL.

Defect in entitling of affidavit—Evidence of party to the record rejected, he having heard other testimony—14 & 15 Vic., ch. 66.

An affidavit entitled C. D. (the defendants) at a suit of, —or, and, —A. B. (the plaintiff) is bad.

One of several defendants was called as a witness in their and his own behalf. It appeared that he had been in court during part of the examination of another defendant in the cause. Notice had been given on a previous day of the assizes, that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses, the Judge therefore rejected his evidence, and held that he had authority to do so.

This was an action of assumpsit, tried in May, 1852, at Hamilton, before Draper, J. The plaintiff had a verdict. Mixer, one of the defendants, was examined as a witness

on the defendants' part, and Matthews, another defendant was called and sworn, but as he stated that he was present in court when the plaintiff's first witness was sworn, and remained, and heard "half or so" of his evidence, he was not permitted to give testimony in his own favour.

In Easter Term, *Burton* obtained a rule *nisi* for a new trial, on the ground that the evidence was improperly rejected; that the judge had no more authority to reject a party to the cause as a witness, because he remained in court after notice that if he did so he would not be allowed to testify, than any other witness, not a party, who remained in court after having been ordered to withdraw, in which latter case the modern authorities decide that the judge has no right to reject the witness on this ground. He cited *Chandler v. Horne*, 2 M. & Rob. 423 (*a*). He also moved on affidavits—one of which was entitled "*Horace Mixer, William Matthews, Alfred Reid, and Philip Cady VanBrocklin, defendants, at suit of (and) Thomas B. Winters, plaintiff,*" and the other commenced in like manner with the names of the defendants, and after the word "defendants," continued thus, "and Thomas B. Winter, plaintiff."

In this term *John Duggan* shewed cause. He took a preliminary objection to the title of the defendants' affidavit, and cited *Richard v. Isaac*, 1 Cr. M. & R. 136, as expressly in point; and subject to this objection, he filed affidavits in reply. He also argued in favour of the rejection of Matthews, stating what was admitted by other side, that notice had been given on a previous day by the judge who presided, that if parties to any record desired to be examined as witnesses in their own behalf, they must be careful to be out of court during the examination of the other witnesses, or their testimony would not be received.

DRAPER, J., delivered the judgment of the court.

The objection to the affidavits is upheld by the case cited, which has not been, so far as I know, overruled, and is referred to as authority in the books of practice.

It appears to have been considered as a matter resting in the discretion of the judge, whether he would suffer a

(*a*) See also *Cook v. Nethercote*, 6 C. & P. 742.

witness to be examined who remained in court and heard the cause proceeding, after an order to withdraw ; and this is stated by Coleridge, J., in *Thomas v. David* (a), and is sustained by the ruling of the same learned judge in *Reg. v. Murphy* (b); and in *Parker v. McWilliam* (c), the same doctrine is upheld, in which case Tindal, C. J., says :—“ The rule with respect to the rejection of the testimony of witnesses who have remained in court after an order for their exclusion, has obtained in the Court of Exchequer for many years, and is universally known there. It was established in favour of the subject, and with a view to the fairness of the proceedings chiefly at the instance of the crown.” It does not seem that the authority of the Court of Exchequer to make such a rule of practice, has ever been doubted. It is done in the exercise of a sound discretion, for the more effectually attaining the ends of justice. If the *power or discretion*—for the same thing is meant—is admitted to be in the court trying any cause, there is an end of the argument. Admitting the authority of *Chandler v. Horne*, and observing also what is said in *Cook v. Nethercote*, neither of those decisions have a direct bearing on the present case, unless there be no difference between a party to the record and a merely disinterested witness. It may be a sound argument to urge that a party ought not to be deprived of his evidence because his witness chooses to disregard the order of the court ; but it does not appear to us to follow that a party may himself set such an order at defiance, and still claim as a matter of right to testify. In the one case, he may complain of being made to suffer by the disobedience of a party whom he could not control ; in the other, he seeks to gain an advantage by his own contumacy for it may be fairly assumed against him that he remains in court with a view of knowing upon what point his own evidence was most required. We do not, therefore, consider that in rejecting his testimony, the court are going against the principle of any reported case, or are assuming a discretion to contravene the enactments of the legislature.

(a) 7 C. & P. 350.

(b) 8 C. & P. 297.

(c) 6 Bing. 683.

We think the evidence was rightly refused, and that the rule therefore must be discharged with costs.

Rule discharged (a).

SMILEY V. MCDUGALL.

Libel—Immaterial variance.

The libel as set out in the declaration was as follows: "We had thought that the hellish malignity and murderous disposition which the tory party had been accustomed to exhibit in past times, would not be witnessed in the election contests of the present day. *We supposed that they had become aware of the fact,*" &c. The last sentence as proved was, "We supposed that they had *by this time* become aware of the fact."

Held, That the variance was immaterial.

Case for libel. The libel, as set out in the first count of the declaration, was in the following words:—"We had thought that the hellish malignity and murderous disposition which the tory party had been accustomed to exhibit in past times, would not be witnessed in the election contests of the present day. We supposed that they had become aware of the fact, that such conduct was one of the chief causes of their downfall as a party, and had determined to re-establish themselves in the good opinion of the country by carrying on their contests in an open, peaceable, and constitutional manner. But they can't forget their old tricks. In several instances, during the present struggle, they have committed acts of violence that should send the perpetrators to the penitentiary. Mr. White, the member for Halton, was set upon the other night in Hamilton by two or three tory rowdies, headed by Smiley of the *Spectator*, and beaten in the face and eyes in a most brutal manner."

The same libel, *verbatim*, was set out in the second count.

The libel proved differed from that set out in this respect—as declared upon, one sentence reads, "We supposed that they had become aware of the fact that such conduct was," &c. In the libel proved the same sentence reads, "We supposed that they had *by this time* become aware of the fact that their conduct was," &c.

The pleas were, the general issue; and a justification, to the effect that the plaintiff and three others were assembled

(a) By 16 Vic. ch. 19, a party to the suit cannot now be called as a witness in his own behalf.

together at the city of Hamilton, and were then and there conducting themselves in a riotous and disorderly manner; and that the said White being then and there present, a certain dispute took place between him and the plaintiff, and thereupon the plaintiff and the said other persons aiding and assisting him, and by his direction, so then conducting themselves, as aforesaid, in a riotous and disorderly manner, and with force and violence, beat the said White in and about his face and eyes, and thereby injured his person; wherefore the defendant published, &c.

The case was tried before Draper, J., in May, at Hamilton. The defendant, who conducted his defence in person, applied for a nonsuit on the variance above set forth. The judge held that the variance was unimportant, not being contained in anything which is directly of and concerning the plaintiff; and that if necessary, it might be amended.

The jury found for the plaintiff, and 5*l.* damages.

In Easter term, *Richards* obtained a rule *nisi* for a new trial, on affidavits charging misconduct in the clerk impanelling the jury; and on the law and evidence, and for misdirection: or to arrest the judgment on the ground that the publication was not in express terms called a libel; citing *Cooke v. Smith*, McLel. & Y. 250.

In this term, *Burton* shewed cause. He filed affidavits fully meeting the charge against the conduct of the clerk with regard to the selecting of the jury. He argued also that the variance, which consisted in the omission of words quite immaterial to the general sense of the passage, was in a part of the publication which might be altogether struck out as redundant and superfluous, since it did not form any part of the attack upon the plaintiff's character, for which the action was brought; nor did it effect in any way the sense or meaning of the libellous passage. With regard to the arrest of judgment, he cited *Rowe v. Roach*, 1 M. & S. 304.

Richards, contra, admitted that the plaintiff's affidavits appeared to meet the charge against the clerk. He argued that the variance was material. It was matter of description of the libel complained of. That, if amenable, no leave to amend was asked or granted. He cited the *Queen v. Dr. Drake*, Salk. 661; *Cartwright v. Wright*, 5 B. & Al.

615; *Tabart v. Tipper*, 1 Camp. 350; *Prudhomme v. Fraser*, 2 A. & E. 645; *Parmiter v. Coupland*, 6 M. & W. 105. He did not press his motion in arrest of judgment.

ROBINSON, C. J.—The objection taken to the manner in which the jury was alleged to have been impanelled has been so fully met by the affidavits filed in answer, that it is conceded that the verdict cannot be interfered with on that ground.

As to the other exceptions taken, I think there is none of them which we could properly suffer to prevail. It is clearly not necessary that the word “libel” should be used in complaining of a false and malicious publication; that has been expressly decided. It is in the first count only, not in the second, that the word “libel” is omitted. If the omission were fatal, the verdict being general, the well known rule in civil proceedings would perhaps apply though it would really be absurd that it should, for the jury could not have given damages upon the first count which there can be any reason to suppose they might not have given upon the second, since the publication stated in each count is precisely the same. And, besides, the first count does call the publication *libellous*.

The variance, in leaving out the words “by this time,” I think is of no moment, since it is impossible to deny that the words “they had become aware,” and “they had *by this time* become aware” mean the same thing. The case of *Cartwright v. Wright* (a) is a strong authority against the objection; for, although the court gave effect to the exception taken there, their whole language shews that they would have held this to be an unimportant variance. And what makes this case more plain in favor of the plaintiff is that the libel is not here set out as in *hæc verba*, or according to its tenor; but it is alleged, that in a certain newspaper the defendant “published, amongst other things, a false, scandalous, and malicious article, containing the libellous matters following.” That is literally true; the paper does contain all that is set out; and the sense of that which is set out is in no manner qualified in the paper by the three words omitted.

(a) 5 B. & AL. 616.

As to the merits of this case: it is clear, on the evidence, that the plaintiff had a good right to complain that the publication went far beyond any ground that in truth existed for such assertions as it contained; and it can hardly be contended, that the liberty of public discussion for any purpose should go so far as to protect the publisher of a paper in charging others with making brutal assaults, which were either never made, or never made by the person charged with them.

The damages given were moderate, which shews that the jury went as far in favor of the defendant as they felt they could go, in attending to any supposed mitigating circumstances.

DRAPER, J.—I continue of the opinion expressed by me at the trial. The sense of the libel—*i. e.*, of all that portion of the publication which is of and concerning the plaintiff, which alludes to, and charges him with anything that makes the publication a libel—remains entirely unaltered. If the whole sentence commencing, "We supposed that they &c.," and ending with "peaceable and constitutional manner," had been omitted, it would not, according to Lord Ellenborough's decision in *Tabart v. Tipper*, have been a ground of nonsuit; and I cannot see any solid distinction between omitting a whole or a part of a sentence which does not alter or qualify the meaning of the libellous passage.

As to the argument of freedom of criticism to be allowed with regard to the conduct, &c., of public men, as applying to the plaintiff as editor of a public newspaper, and therefore proper to have been left to the jury to disprove malice, it appears to me sufficient to observe that the libel charges an indictable offence, and the plea justifies the charge by distinctly alleging that the plaintiff committed one—*viz.*, an assault and battery. I have to learn how that can be considered as a fair comment on the plaintiff's conduct as editor of a public newspaper. I find nothing in *Parmiter v. Coupland* to warrant any such conclusion.

BURNS, J., concurred.

Rule discharged.

SHAW V. CAUGHELL.

Guarantee—Evidence—Consideration.

In an action on the following guarantee—"I do hereby promise to guarantee the payment of any sum to S. S., that the arbitrators chosen by himself and F. S. & Co.—namely, P. C., J. W., W. B. W., and J. F., and a fifth person to be chosen by them—may award to him the said S. S. in the arbitration now pending between the said parties," dated the 29th of September, 1851—the declaration stated, that, in consideration that the plaintiff, at the defendant's request, would leave certain differences then existing between the plaintiff and F. S. and P. S., to the award of, &c., the plaintiff promised to pay him any sum that might be awarded to him by such arbitrators. A bond of submission to the above arbitration was signed by F. S. & Co., on the 3rd of October 1851.

Held, That evidence shewing that the arbitration was not conclusively agreed upon, when the guarantee was signed, that the guarantee sustained the consideration alleged, and that the words "now pending," did not necessarily imply a part consideration.

Assumpsit.

The first count of the declaration stated that in consideration that the plaintiff, at the defendant's request, would leave certain differences then existing between the plaintiff and F. Smith and P. Smith, to the award of P. C., J. W., W. B. W., and J. F., and a fifth person to be chosen by them, the defendant promised the plaintiff to pay him any sum that might be awarded to him by such arbitrators; that the plaintiff did leave the said differences to such arbitrators, whereof the defendant had notice; that the arbitrators awarded that F. Smith and P. Smith should pay to the plaintiff 95*l.* 5*s.*, whereof the defendant had notice. Second count, on an account stated.

Pleas, *non-assumpsit* and set-off, to which last the defendant replied, "not indebted."

At the trial at Simcoe, in April, 1852, before Draper, J., the plaintiff proved the following writing: "I do hereby promise to guarantee the payment of any sum to Silas Shaw, that the arbitrators chosen by himself and F. Smith & Co.—namely P. C., J. W., W. B. W., and J. F., and a fifth person, to be chosen by them may award to him, the said Silas Shaw, in the arbitration now pending between the said parties." Dated 29th September, 1851. He also proved a bond, entered into by F. Smith and P. Smith, to himself, dated 3rd October, 1851, in a penalty of 500*l.*, conditioned that the obligors should obey, &c., the award of

P. C., J. W., W. B. W., J. F. and A. M., or any three of them, arbitrators chosen between the plaintiff and Smith & Co., so as the award of the arbitrators or any three of them be made before the 11th of October instant;—and an award, dated 10th October, 1851, under the hands and seals of the five arbitrators, by which they awarded 96*l.* 5*s.* to be paid to the plaintiff in ten days. One of the arbitrators was called, and swore that after the award was made the defendant came for a copy of it and of his guarantee, and was told what the award was, when the defendant said he had guaranteed the award and considered himself liable for the amount. A demand on Smith & Co., and non-payment, were admitted.

For the defendant it was objected that the declaration was not founded on a guarantee that another person should do any act—viz., that Smith & Co. should pay the amount—but it was an undertaking of defendant's own that he would pay whatever was awarded. Secondly, that the writing was not legally binding as a guarantee, as no sufficient consideration appeared on it for the defendant's promise; that the consideration stated in it was a past consideration, *i. e.*, of an arbitration *now pending*, whereas the declaration stated as the consideration an agreement to submit; and that the plaintiff's counsel having opened that he should not rely on the account stated, the defendant need not answer it.

The defendant had leave to renew the second objection on a motion for a nonsuit; and the first was overruled, as the jury might find the facts specially, and they might be endorsed on the record.

The jury found that the defendant executed the instrument on the 29th September, 1851; that the bond of submission was executed as put in; and that the award was made as put in, and in pursuance of the submission; that the amount was demanded of Smith & Co., and was not paid by them; and they found for the plaintiff on these facts, with 96*l.* 5*s.* damages.

In Easter term, *Read* obtained a rule *nisi* to enter a nonsuit on the leave reserved.

In Trinity term, *Galt*, shewed cause. He relied upon *Hawes v. Armstrong*, 1 Bing. N. C. 761.

Read, contra, argued that the instrument was not a guarantee that Smith & Co., should pay, but a promise by defendant that he would pay whatever should be awarded in plaintiff's favour; that there was no sufficient consideration stated for such promise, and that the consideration stated in the instrument, as far as could be inferred, was past and executed, as if it had been," in consideration of an arbitration now pending, I hereby promise," &c., and did not support the declaration, which stated the consideration to be in consideration that the plaintiff would refer to arbitration. He also objected, that it did not appear that the plaintiff had referred to arbitration; the bond produced only shewed that the Smiths had. He cited *Goldshede v. Swan*, 1 Exch. 154; *King v. Cole*, 2 Exch. 628; *Raikes v. Todd*, 8 A. & E. 846; *Jenkins v. Reynolds*, 3 B. & B. 14; *Wood v. Benson*, 1 Cr. & J. 94; *Bentham v. Cooper*, 5 M. & W. 621; *Brashier v. Jackson*, 6 M. & W. 549; *Edwards v. Baugh*, 11 M. & W. 641; *Richards v. Macey*, 14 M. & W. 484.

ROBINSON, C. J.—I am of opinion that this action cannot be looked upon as an action founded in reality upon what is called in law an original promise, and so that the evidence, when the instrument is produced, varies from the declaration. It is in its very terms a guarantee. The defendant is only secondarily liable, and engages, in effect, to pay the award if the principal should fail to do it.

I think, also, that the consideration does sufficiently appear in the instrument, and that we see plainly from the evidence that it was not a past consideration. The parties, it is true, had taken steps towards a settlement of their disputes by arbitration before this writing was given; but that may have been, and the reasonable inference from the conduct of the parties is, that it was provisional only, and depending, as to its final effect, upon whether the party for whom the defendant afterwards became bound should find security that he would pay any sum awarded. We see that the defendant signed the guarantee; and then, and not

before, the submission bond was signed. That the submission bond on the other side was not shewn to have been executed; was not an objection taken on the trial; and besides, there is no necessity that both should be bound by specialty to submit to the award. The plaintiff could have revoked his submission, for all that appears, while the arbitration was pending; and when he agreed to be bound by the award in case this defendant would guarantee the payment, he furnished a sufficient consideration to support the guarantee. The cases of *Johnston v. Nicholls* (*a*); *Goldshede v. Swan*; *Haigh v. Brooks* (*b*); *Steele v. Hoe* (*c*), shew the liberal view which the courts now take for the benefit of commerce, of guarantees of this description, allowing the reception of evidence of the surrounding circumstances in order to arrive at a proper construction of the guarantee.

There is nothing to be considered by us, on the rule before us, but the single question whether the defendant was entitled to a verdict on the leave reserved; and we do not think that he was.

DRAPER, J.—The question raised is, whether the guarantee proved sustains the allegation of consideration set forth in the declaration; and I am of opinion that it does. In order to ascertain the meaning of parties in agreements of this description, the courts in England have held that they might and ought to look at the circumstances attending the transaction, and to be influenced by their bearing, in ascertaining the true construction (*d*). Acting on that principle, and referring to the state of facts between the parties interested at the time the plaintiff and defendant entered into this agreement, it appears to me we ought, if possible, to put such an interpretation on it as will effectuate their obvious intention. It all turns on the words “now pending.” If we are not obliged to treat them as implying a submission actually and conclusively entered into, there is no difficulty. Now it is clear, from the attending facts, that such could not have been the meaning intended; for the

(*a*) 1 C. B. 251.

(*b*) 10 A. & E. 319.

(*c*) 14 Jur. 147.

(*d*) *Bell v. Welsh*, 14 Jur. 432

bond of submission entered into between Smith & Co. and the plaintiff was executed several days after the grantee declared upon.

I think we are at liberty to treat the words "*now pending*," as used in the sense of "*impending*," as referring to an inchoate but not complete reference; to a state of things where the subject of reference was agreed on, the arbitrators named the time and condition of making the award settled, but the formal submission, which was actually to bind the parties, was yet to be prepared. The evidence is consistent with the view, and supports and establishes the consideration stated in the declaration. And I am of opinion that this is the true construction of the grantee, and therefore that the rule should be discharged.

BURNS, J., concurred.

Rule discharged.

DOUGALL V. TURNBULL.

Rent charge—Seizable under fi. fa.—Debt for arrears of.

Debt does not lie by the grantee of a rent-charge to issue out of lands, where there is no express covenant by the grantor to pay.

Quære—If the grantee could bring debt, whether his assignees might do so.

A rent-charge upon land for the life of the grantee is seizable by the sheriff under an execution against lands.

Debt for arrears of an annuity or rent-charge.

Demurrer to the declaration.

Wallbridge, for the demurrer, cited *Webb v. Jiggs*, 4 M. & S. 113; *Kelly v. Chubbe*, 3 B. & B. 130; *Milnes v. Branch*, 5 M. & S. 411; *Crabbe*, R. P. secs. 254, 255.

Helliwell, contra, cited *Varley, et al. v. Leigh*, 2 Ex. 446.

The facts appear in the judgment.

ROBINSON, C. J.—The transactions respecting this annuity were before us in a case between these same parties, in Trinity term last (a), and we determined that the declaration then before us could not be sustained, but for two reasons which cannot be relied upon as the declaration is now framed.

The first was, because the declaration did not shew that

(a) S. U. C. R. 622.

the sheriff seized while the writ was current. The second was, that the rent-charge in this case did not appear to be such an interest as could be seized on a *fi. fa.* against real estate, because it was not shewn that there was any right given by the deed to distrain for the rent-charge, and we could not regard what, for all that appeared, was a mere rent-seck as a freehold interest, and unless it was such, it could not be sold under a *fi. fa.* against "*lands and tenements.*"

Now this declaration does expressly aver that the sheriff seized while the writ was current and in force, and it sets out a provision in the deed creating the rent-charge, that the grantee, or her assigns, might distrain for arrears; so that we have to consider the case on other grounds than those on which our former judgment was founded.

As the deed is set out, the rent-charge was granted to Agnes Smith, to be yearly issuing, had, taken, and received by her, and her assigns, during her natural life, out of all that parcel or tract of land, &c., to be paid half-yearly, on, &c., to hold the said annuity to her and *her assigns*, from, &c.; and the defendant covenanted with the said Agnes Smith and *her assigns*, that, in case of the rent being in arrear, it should be lawful for her and her assigns to enter and distrain. No covenant appears from the defendant to pay the rent-charge.

The question is, will debt lie by the plaintiff, claiming as vendee of the sheriff, for arrears of the rent-charge accruing after sale under the execution. This now appearing to be a rent for the grantee's life, charged upon certain land, with power to enter and distrain for arrears, I think it was that kind of freehold interest which the sheriff could sell under a writ against lands, and that we must look upon the plaintiff as assignee of the rent-charge, as much as if Agnes Smith had by deed assigned it to him. Then, this being so, can the plaintiff sue the grantee in debt for arrears, when there is no statement of any such covenant?

It is to be considered, in the first place, whether, if Agnes Smith had continued still to hold this rent-charge, she could have sued in debt for arrears; because if she could not, then of course no such action can be brought by her

assignee; though if she could sue in debt, it would still remain to be considered whether her assignee could sustain an action of debt in his own name, as on a covenant running with the estate or interest. Whether even Agnes Smith, the original grantee of this rent-charge, could sue in debt for arrears of the annuity, depends upon two considerations, of which the first is the effect of this being a freehold charge upon land, with power of distress, which we now see was given by the deed. In *Webb v. Jiggs* it was determined that debt would not lie by the devisee of a rent-charge to hold during the life of a third party, upon the ground that, while the rent continued a freehold interest, a personal action was not the proper remedy, for that the law will not suffer a real injury to be remedied by an action merely personal, for which *Oguel's case* 4 Rep. 486, was cited, also Com. Dig., Debt A. 6, 7; *ibid* B.; and 1 Roll. Abr. 594, G. Pl. 1; and the court held it to be clear that the statute 8 Anne, ch. 14, which allows an action of debt to be brought for rent reserved upon a lease for life, does not apply to a case like the present, where there is no lease. In *Kelly v. Chubbe*, the action was by the husband of the party to whom a rent charge had been granted for her life by the defendant, and the annuitant was still living. That case more resembled the present, and the court held the action would not lie. But then, since these cases were decided, real actions have been abolished here as well as in England; and in *Varley v. Leigh*, the Court of Exchequer determined that debt would lie for a freehold rent-charge on land where there was an express covenant to pay it. They seem to consider that in *Webb v. Jiggs*, and in *Kelly v. Chubbe*, if there had been a covenant to pay the rent, debt would have lain for any arrears due under such covenant if it had not been for the other difficulty, that the rent being a freehold rent the party must take his remedy by real action. The Chief Baron intimated that, if in the case before them there had been no covenant, he would have acceded to the argument which had been pressed upon them—that there being now no remedy by real action for the recovery of a rent, there ought to be a remedy by action

of debt. Rolfe, Baron, however, expressed strong doubts whether he could have concurred in that view; but the court held the action clearly sustainable by reason of the express covenant. Now, in the present case, the declaration shews nothing but a rent-charge granted by deed to Agnes Smith, to hold to her and her assigns for her life, with power of distress. We see nothing of any covenant by the grantor to pay the rent. We might well have been willing to give or to sell an annuity to issue out of certain lands, when he would have been unwilling to make himself a debtor for such an annual sum to be paid at all events, whether it could be made from the land or not. We see no authority to support an action of debt for arrears, when there is no personal charge upon the party granting the rent, as there is not in this case, and reason is against it. In Co. Lit. 144 *b*, it is laid down that the grantee of such a rent-charge has his election to bring his writ of annuity, or to proceed by distress, but that debt will not lie; and in the argument of Webb v. Jiggs the counsel for the defendant remarks, that this must be understood of a rent granted by deed *which charges the persons*, but not where there is not any charge upon the person. In Varley v. Leigh, as I noticed before, the distinction was taken and admitted between such cases, where there was, as in the case before us, the mere grant of a rent-charge, and those cases in which the grantor brought a personal charge upon himself by covenanting to pay the annuity.

I am of opinion then, that in this case, which is one of a freehold rent still continuing, the grantee for life being still living—whether debt would lie or not by the grantee against the grantor, if there had been a covenant to pay the rent, which seems doubtful on the authorities; yet that there being no covenant, and no privity of contract between the parties, debt could not be maintained for arrearages by Mrs. Smith herself, if she retained her interest. It is unnecessary therefore for me to give my opinion upon the right of action which her assignee would have; and I will only remark that the case of Milnes v. Branch seems to me to be a strong authority against the assignee bringing debt,

even where the grantee could have done so, for Lord Ellenborough says in that case that he finds no authority for the position that the covenant to pay a rent-charge runs with the rent, and that he does not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that "rent is land," and that rent is not included in the word "land" is held to be clear.

The defendant is entitled, in our opinion to judgment on the demurrer.

Judgment for defendant on demurrer.

HOPKINS V. BROWN.

Will, construction of—What interest taken by executors.

In 1848, J. H. by her will devised as follows:—"The charges of my declining days and my funeral first to be paid, after which *I give and bequeath all my real estate, known as, &c., to be sold to the best advantage* and which is to be divided in manner and form as follows." Certain legacies were granted to children and grand-children, and the remainder of the estate was directed to be equally divided between two daughters of the testatrix. The will concluded thus—"for the execution of this my last will and testament, and I hereby nominate and appoint A. B., S. H., and W. H., joint executors, hereby giving them full power to settle all business by me kept unsettled, hereby revoking all other and former wills by me at any time heretofore made." *Held*, that the executors took a power, not a legal estate.

Ejectment for part of lot 80, in the township of Thorold, tried before Sullivan, J., at Niagara.

On the 13th of February, 1830, Jane Hopkins conveyed the premises in question to Abraham Brown.

On the 25th of December, 1837, Abraham Brown reconveyed 46 acres of the tract to Jane Hopkins.

On the 24th of August, 1848, Jane Hopkins made her will as follows:—"The charges of my declining days and my funeral first to be paid, *after which I give and bequeath all my real estate known as part of lot 80, in the township of Thorold, as described in my deed for the same to be sold to the best advantage, and which is to be divided in manner and form as follows*:—first, I give and bequeath to my grandson, Swayzer Hopkins 2*l.* 10*s.*; to my grand-son, Silas S. Hopkins, 25*l.*; being the sons of my dear son, Silas Hopkins; to my daughter, Mehitable Marlatt, or her heirs 37*l.* 10*s.*; a like sum to my dear daughter, Anne Parkinson, or her heirs; to be paid in one year after my

decease; and after paying the above legacies, the remainder of my estate to be divided equally between my daughter Elizabeth Brown, or her heirs, and Lydia Howe or her heirs: *for the execution of this my last will and testament; and I hereby nominate and appoint* Abraham Brown, my son-in-law, and Samuel Howe, my son-in-law, and friend William Harvy, joint executors; hereby giving them full power to settle all my business by me kept unsettled; hereby revoking all other and former wills by me at any time heretofore made. In witness whereof, &c."

Jane Hopkins died in 1849.

A verdict was taken for the plaintiff subject to the opinion of the court.

The question was, whether, under this will, the executors took any interest or only a naked power to sell. If the former the verdict was, by consent, to be entered for the defendant; if otherwise, for the plaintiff, who made title as heir of Jane Hopkins, being the second son of her eldest son; an elder brother having gone to the United States ten or twelve years ago, and not having been heard of for eight years was supposed to be dead. He left no issue.

Vankoughnet, Q.C., for the plaintiff, cited *Doe dem. Hampton v. Shotter*, 8 A. & E. 905.

Cooper, for the defendant, cited Co. Litt. 112, *a*; *Forbes v. Peacock*, 11 M. & W. 630, 11 Sim. 152, S. C.; *Tylden v. Hyde*, 2 Sim. & St. 238.

ROBINSON, C. J.—My only doubt is, whether the use of the words "give and bequeath" in this case do not amount to something more than "devising the land to be sold by the executors," or "devising that the executors shall sell," both of which forms of expression, it seems to be now settled, are no other in effect than a direction that the executors shall sell, by which a power only would be given, and no interest would vest in the executors. Lord Hale seems to have held otherwise in *Barrington v. the Attorney General* (*a*); and Lord Coke uses language, also, which shews that, in his understanding of the law, devising "that the executors shall sell," would amount to a disposition of

(a) *Hardres* 419.

the estate from the heir, and would carry an interest by force of the word devise. Mr. Hargrave's note, also, referred to by us in *Nicholl v. Cotter* (a), would more than bear out what the defendant in this case contends for.

I take the law, however, to be now well settled upon such a footing, notwithstanding those authorities to the contrary, that a "*devise*" of lands to executors, "*to be sold*" or a "*devise that the executors shall sell,*" amounts to no disposition of the estate, but to a mere direction. But I have some hesitation in determining that the words used in the will now before us—" *I give and bequeath all my real estate to be sold to the best advantage,*" do not go further towards a disposition of the estate from the heir than any words which have yet determined to amount only to a power. They indicate an intention to dispose;—"give and bequeath" are never used in the sense that "*devise*" sometimes is, when it means nothing like a gift but only to contrive, to invent, to plan.

My brothers, I believe, consider that, as the will does not say in terms that the testator gives and bequeaths his lands to any person in particular, we cannot, therefore, hold that he has, by these words, given and bequeathed it for any purpose; but he has given and bequeathed it to be sold for purposes which are to be carried into effect by his executors—namely, that the money shall be distributed among certain persons named. In such cases there is no doubt that the executors though the testator may have omitted to say so, are the persons by whom the estate is to be sold. And that being so, the difficulty I have is, in reconciling it to myself to say otherwise than that the effect of the whole will is, that the testator "*gives and bequeaths*" his land to his executors to sell; in which case, certainly, they take the estate for that purpose, and it does not go to the heir. But I give this only as an intimation that I am not so well satisfied as I believe my brothers are, that we might not hold the estate to have passed under the devise, though the general tendency of the more modern cases does

(a) 5 U. C. R. 564.

seem to incline the other way; and I do not therefore differ from the judgment, which will be for the plaintiff.

DRAPER, J.—In *Blatch v. Wilder* (a), the testator devised all his real and personal estate, whether freehold or copyhold, to be sold for payment of his debts, and appointed two executors. Lord Hardwicke said, “I am of opinion that moneys arising from the sale of lands devised to an executor for the payment of debts, of which the executor is empowered to sell, are legal assets, and administrable as such; and such money being assets, likewise, in the same manner in the present case, it is a very reasonable construction that the executor should be the person who should make the sale; and I therefore decree that, in case the personal estate should not be sufficient to pay the debts and legacies, that then the real estate of the testator, both freehold and copyhold, shall be sold, and that likewise that the executors and the heir shall join in the *sale*.” The heir, in that case, was an infant, and his lordship took a distinction between cases where lands are devised to trustees to be sold for payment of debts, and the heir is an infant, in which he has no day to shew cause when he comes of age; and those, such as the case before him, when the lands are not devised to any particular person.

I presume the direction that the executor and heir should join “in the *sale*,” should be read “in the *conveyance*,” his lordship having already expressed his opinion that the executor should be the person who should make the sale; and I therefore look on this case as an authority for the position, that where the estate is devised for the payment of debts, but not to any particular person, the fee descends on the heir at law, subject to be divested by a sale, to which the heir is a necessary party.

The cases reviewed in *Chance on Powers*, 141 to 171 inclusively, seems to me to lead to the same conclusion, and, consequently, that the lessor of the plaintiff is entitled to judgment.

BURNS, J., concurred.

Judgment for the plaintiff.

BROWNE ET AL. V. THE COMMERCIAL BANK OF THE
MIDLAND DISTRICT.

Note endorsed to bank for collection—Their liability for want of due diligence in presentment.

The plaintiffs indorsed a promissory note to the defendants for collection —The note was made by one C. C., living in Cobourg, payable to the order of one G. S. B. generally, not at any bank or other place; and from G. S. B. it had passed by several endorsements to the plaintiffs. After it had been received by the defendants, it was indorsed by their teller at Toronto in favor of J. T., their agent at Cobourg.

The different endorsers were notified by the Bank that the note had been presented to the maker, and payment refused, and that the Bank looked to them for payment; and the note was returned to the plaintiffs as having been duly presented.

The plaintiffs then sued the indorsers, but were defeated in their actions, in consequence of a want of proper presentment for payment.

Held, that, under the circumstances of this case, the Bank were liable to the plaintiffs for such want of presentment, notwithstanding a notice issued by them, and which the plaintiffs had received, that all notes delivered to them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities, or mistakes, in respect of such notes.

The first count in the declaration set forth, that defendants were a public company and banking corporation, carrying on the business of banking in its various branches, and, among others, receiving from their customers and others various promissory notes and bills for the purpose of receiving the monies due thereon, and for the purpose of presenting such bills and notes to the makers and acceptors thereof, for payment; and in case of non-payment, for the purpose of duly notifying the indorsers and drawers of presentment and non-payment, and that the holders would look to such drawers and endorsers for payment: that the plaintiffs were customers of the defendants in such banking business, and had at various times deposited with them moneys, securities, bills, notes, and drafts, which bills, notes, and drafts were drawn, accepted, indorsed, and made by various persons, to be discounted and cashed by the defendants for the plaintiffs, and also for the plaintiffs to be by the defendants collected and presented, according to law, for payment, to the persons liable as makers or acceptors; and if not paid, that the drawers and acceptors should be duly notified: that the plaintiffs, on, &c., were lawfully possessed of a promissory note for 250*l.*, with interest from date,

made by Charles Clarke, at the time of making and for some time thereafter resident at Cobourg, and well known to the defendants, payable to the order of George Strange Boulton fifteen months after date, which note was duly indorsed by the said G. S. B., and by P. F. McQuaig & Co., and by Joseph Pearson, and by M. W. & E. Browne, by whom it was delivered to the plaintiffs for a valuable consideration: that before the said note became due the plaintiffs, so being customers of and dealers with the defendants, delivered the said note so indorsed to the defendants for collection for the plaintiffs; and for the purpose (for certain reward to the defendants in that behalf) that the same should be duly presented by the defendants for payment to Clarke on the day when it should become payable; and that, if Clarke should not pay it, then that due notice should be given by the defendants to the several indorsers, of the presentment to Clarke, of the non-payment, and that the holders looked to the indorsers for payment: that defendants accepted the said note for the purpose and on the terms aforesaid: that although the note was received by the defendants in ample time to be duly presented, and was held and retained by the defendants from the receiving thereof until long after it was payable, and being so in the hands of the defendants, fell due on, &c., yet the defendants—disregarding their duty in that behalf, and designing to injure the plaintiffs, and to deprive them of the amount of the note—did not present the note to Clarke for payment, according to the tenor and effect thereof, on the day when it fell due, or on any other day—although the said note might have been presented to the said Clarke, who then was, and still is, residing within the jurisdiction of this court—but the defendants so carelessly, negligently, and improperly behaved themselves in the premises, that they did not present or cause to be presented the said note to Clarke when it fell due, or at any time before or since, but therein wholly failed; and the note was not paid by Clarke, or any of the indorsers, and is still unpaid to the plaintiffs, by means whereof the endorsers became discharged from liability to pay, and have refused to pay; and

Clark being insolvent, the plaintiffs have wholly lost the amount of the note; and the plaintiffs, relying on the proper discharge of their duty by the defendants, and being informed by them that the note had been duly presented, and being ignorant of the defendants' default, commenced one action for the recovery thereof against George S. Boulton, and another against P. F. & J. S. McQuaig, in each of which actions the defendants pleaded the non-presentment to Clarke for payment; wherefore the plaintiffs, on discovering the defendants' breach of duty, were forced to abandon the said actions, and expended a large sum for costs.

The second count stated that the defendants, being such bankers as in the first count mentioned, and the plaintiffs being their customers, &c., and the plaintiffs being possessed of the promissory note made and endorsed, &c., long before the note became due, delivered the said note to the defendants in their said business, for collection by them for the plaintiffs, and for the purpose, and in consideration of certain reasonable reward, that the note should be by the defendants duly presented for payment to the maker on the day when it should fall due, and if not paid, then that the defendants should give due notice to the indorsers: that defendants accepted the note for the purpose, and on the terms aforesaid; that the note remained in the defendants' possession from the delivery to them until long after it became due; and although the note was presented to Clarke on the day it became due, and Clarke did not pay it, yet the defendants did not duly notify the indorsers, or any of them, of such presentment and non-payment, though the indorsers place of residence was within the jurisdiction of this court, and was well known to the defendants; but the defendants so carelessly, negligently and improperly conducted themselves, that none of the indorsers were duly notified, and the indorsers were by the neglect and default of the defendants wholly discharged; that Clarke was and still is insolvent, and the note remains unpaid and the indorsers refuse to pay it; and the plaintiffs have expended a large sum of money in various suits brought by the plaintiffs—in ignorance of the default and breach of duty of the defendants, and on the defendants' representation

that the indorsers had been duly notified—against Boulton and McQuaig &c., &c.

Pleas—1st. Not guilty, on which issue was joined.

2nd. That before committing the grievances, &c., and before the delivery of the note to the defendants, and whilst the plaintiffs were the customers of the defendants, the defendants gave notice to the plaintiffs that all notes delivered to the defendants for collection should be wholly at the risk of the persons leaving the same; and that the defendants would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities, or mistakes, in respect of such notes; that the note in the declaration mentioned was delivered to and accepted by the defendants on the terms in the said notice stated, and that the amount of the note was not at any time received by the defendants.

To which the plaintiffs replied, so far as the plea relates to the first count, that the defendants did not use due diligence in presenting the note, but were guilty of such gross and culpable negligence, misfeasance, and wrongful and improper conduct, that by their gross and utter neglect, wilful default, misfeasance, and entire and absolute want of care and attention, and not otherwise, the note was not presented.

And to the plea as to the second count the plaintiffs replied, in the same terms, gross negligence in not giving notice to the indorser.

The defendants rejoined, traversing that they were guilty of such gross and culpable negligence, misfeasance, and wrongful and improper conduct; and the plaintiffs joined issue.

The third and fourth pleas to the first and second counts respectively, denied that the plaintiffs delivered, and that the defendants received the note, for the purposes and on the terms mentioned, on which issue was joined.

A special case was made for the opinion of the court, and the same evidence as was given in the case of *Brown et al. v. Boulton*, 9 U. C. R. 64, was made part of the case, to which was added the further evidence of Mr. Ruthven, the bank clerk,—that the note was handed to him in

September, 1848, entered in the usual manner and put away with other notes in the December bundle; that it was within a week of the maturity of the note that he heard of Clarke's removal from Cobourg; that on the day the note fell due the defendant's agent at Cobourg handed it to him, desiring him to call on Mr. Smith, and ask him what steps it would be advisable to take under the circumstances; that the witness did so, and was told by him to "call at Clarke's last place of residence, serve Mr. Boulton with the usual notice, as also the other indorsers, and ascertain from some of the merchants where Clark had removed to;" that the witness did all this, and on calling at Clark's late residence he saw a woman servant, and on asking her if Mr. Clarke was in, she replied, "he does not live here—I don't know anything about him."

The notice of presentment sent to the respective indorsers stated that the note "due this day" (13th December, 1849), had been duly presented at the residence of Charles Clarke, and payment of it demanded, which was refused;" and that the defendants looked to the endorsers for payment.

The note was payable generally, not at any bank or other place, and was endorsed by the defendants' teller at the branch, at Toronto, in favor of James Thompson, the defendants' agent at Cobourg.

It was admitted that when money was not actually collected on notes left with defendants for collections, the usual course was for the defendants to make no charge except for disbursements, but where money is collected, a charge is made; that the note was returned by the defendants to the plaintiffs immediately after it became due, as having been duly presented; and no information was given to them of any difficulty about presentment or notice, until the facts appeared at the trial of the plaintiff's action against Boulton. It was also admitted that the plaintiffs had the notice stated in the second plea.

It was agreed that the court might draw the same inferences and conclusions that a jury might do, and should decide whether the plaintiffs were entitled to recover or not, and directed that judgment be entered for the plaintiffs for

376*l.* 5*s.* and interest, as by confession; or for the defendants as on a verdict in their favour; or nonsuit.

Hagarty, Q. C., and *Vankoughnet*, Q. C., for the plaintiffs, cited *Hinton v. Dibbin et al.* 2 Q. B. R. 646; *Wyld v. Pickford et al.*, 8 M. & W. 443; *Lyons v. Mells*, 5 East. 428; *Shaw v. The York and North Midland Railway Co.*, 13 Jur. 385; *Chippendale v. The Lancashire and Yorkshire Railway Co.*, 15 Jur. 1106; 12 L. J. (Q. B.) 22, S. C.; *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Co.*, 15 Jur. 670; 20 L. J. (Q. B.) 440, S. C.; *Beck v. Evans*, 16 East. 244; *Van Wart v. Wooley*, 3 B. & C. 439; *Shells v. Blackburne*, 1 H. Bl. 158; *Doorman v. Jenkins*, 2 A. & E. 256; *Butt v. The Great Western Railway Co.*, 20 L. J. (C. P.) 241; *Melville v. Doidge*, 6 C. B. 450.

Cameron, Q. C., contra, cited *Nicholson v. Willan*, 5 East. 507; *Harris v. Packwood*, 3 Taunt. 264.

DRAPER, J., delivered the judgment of the court.

The judgment of this court in the plaintiffs' action against one of the indorsers is full on the question of the entire absence of any presentment to Clarke, the maker of this note, or of any sufficient excuse for not making this presentment.

The defence in this case is rested on the notice set forth in the second plea, the effect of which the plaintiffs seek to avoid by replying gross negligence; and by denying, as in the third and fourth pleas, that the defendants received the note for the purpose and on the terms mentioned in the declaration.

This makes it necessary to determine on a review of the pleadings and evidence, what was the contract between the plaintiffs and defendants on which the note was delivered to and received by the defendants.

The argument for the defendants in substance was, that the alleged duty for the breach of which this action was brought arose from contract: that the only consideration on which any undertaking of the defendants was founded, was a charge on moneys collected: and that, both on this account as well as by the terms of the notice they were liable only for such moneys as should come to their hands;

but neither for omitting to take any steps to obtain payment, nor for any informality or mistake in the steps which were taken with that view, nor yet for sending notices to the indorsers, untruly stating that the note had been presented; nor yet for returning the note to the plaintiffs with a false representation that it had been duly presented, and the indorsers duly notified, through which the plaintiffs were induced to bring action against some of the indorsers, which, when the truth was known, they were forced to abandon.

Undoubtedly the Bank should say to their customers, "you may leave any bills or notes at our bank or branches, and we will account to you for any sums which the parties to those bills or notes pay in; but we will not undertake to present, or to note, protest, or give notice to parties whose liability on such bills or notes may depend on such presentment," &c. This is, in effect, what is contended on behalf of the defendants to be the extent of their liability in the present instance; for, if they were liable for nothing but the money actually received by them, they were under no obligation to do anything except to receive the money.

The defendants certainly did not declare affirmatively that they would not present, &c., any bills or notes left by their customers with them, nor do they now contend that such bills or notes were received by them on any understanding that they were not in fact to be presented, &c.; but they urge, that for any omissions, mistakes, or informalities (and by omissions according to the argument in this case, they mean not merely deficiencies in the mode of doing any act, but the total omission to perform it) their notice protects them. In other words it amounts to this, that the Bank profess merely to place, as it were, their machinery at the *use* not the *disposal* of—but at the same time at the risk of—their customers leaving bills or notes with them for collection: the servants of the defendants to act in presenting, &c., such bills or notes rather as the agents of the customers than as the officers of the Bank. For if the Bank is not to be liable for any omissions, &c., in the extended construction put upon the words of the

notice, it is difficult to understand how those officers or their sureties could be answerable to the Bank for such omissions, from which it would appear to follow as a consequence, that, in what they did not omit to do, they were not acting in the regular course of their employment as bank servants.

I do not at present perceive that the Bank customers would have any remedy against the officers of the institution, through whose omission, informality, or mistake indorsers or acceptors might be discharged, and the customers sustain ruinous losses. It strikes me, though I have not endeavored to reason it out, that if the Bank itself is not liable, its officers—between whom, as individuals, and the Bank customers I do not trace any privity—would still less be liable.

The result, then, would be, that the Bank might, at its branch at Toronto, receive a bill or note for *collection*, made payable at the office of the Bank at Cobourg, or at the Bank itself at Kingston, “*and not elsewhere*,” and might keep it till after maturity at Toronto, and then return it as a valueless bit of paper to the customer who had left it with them without incurring any liability for the omission (which I do not assume to be wilful) to transmit it to where presentment was indispensable for its collection.

I do not so construe the contract of the defendants, even upon the express language of the notice, and still less upon looking upon the character of the note left with and accepted by them for collection; and the evidence of what was done corroborates my opinion, by shewing that the officers of the Bank not only did not, but could not have so understood their duty in relation to this note.

In the first place, the note refers to all notes delivered for “collection.” What is to be inferred from this term? If delivered by the plaintiffs, this note was received by the defendants for *collection*—*i. e.* to be collected—which has an active, and not, as is in effect contended, a merely passive sense. To collect, implies not simply to receive the money, but to take steps to obtain it; and unless the subsequent parts of the notice control, or rather destroy this

meaning, there was a duty to take such steps as were necessary for this purpose ; and I think that the charge on moneys collected extends as a consideration for all the steps which were so necessary, as to make them part of the contract.

When it is said that the defendants would be "responsible only for moneys actually received in payment, but not for any omissions, informalities or mistakes in respect of such notes," we are bound, I think, to take into consideration the plain import of the words "delivered for collection;" and if, as is clearly the case, "*collection*" implies an act to be done, the subsequent words should receive, if possible, a construction consistent with a fulfilment of the act necessary, and included within that term "*collection*," and not one which wholly avoids and destroys it; and if the subsequent words limiting the defendants' liability can receive a construction which will afford themselves a reasonable protection, and yet not destroy the very substance of the precedent undertaking, such construction ought, in my opinion, to prevail.

Now I think a substantial distinction may be drawn between the entire omission to do an act indispensable to the collecting a note, and an omission in the mode of doing that act; between the *modus operandi* and the utter abstaining from doing anything; and even if this distinction may appear refined, I should prefer it to the consequences of a contrary opinion, the absurdity of which I have already partially suggested. I conclude that, therefore, notwithstanding the limiting words of the notice, there was an undertaking on the part of the defendants to do any act indispensable to the collection of the note.

This brings me to consider the character of the note. It was drawn payable at no particular place, to the order of a third party, and endorsed by him, and by others after him. Presentment to its maker, or its equivalent, was therefore indispensable to its collection from those secondarily liable upon it. In such a case, to say that the defendants received it for collection, apart from the terms of the notice, implies that they received it for presentation. If they

undertook to do any act, it must have been to present; for until that was done there was nothing else to be done. Ordinarily, notes received at the banks are on the face of them made payable there; and the presentment for payment is virtually made by the note lying there for payment. Here that would not do, and if I am right in the conclusion I have expressed as to the effect of the notice, *a fortiori* that conclusion must apply in such a case as this.

Then looking to the particular facts: the plaintiffs endorsed this note in blank, before delivering it to the defendants here in Toronto for collection, and their teller, indorses it specially in favour of their agent at Cobourg, and sends it to him—Cobourg being at that time the place where the maker resided. Thus, to all appearance, it was, when it reached Cobourg, some time before its maturity, the property of the defendants. It was at Cobourg entered and treated as all other notes in the defendants' possession on which they had to receive the money to their own use. If either of the plaintiffs had been at Cobourg on the day on which the note should have been presented, I see nothing which would have enabled them to interfere, or to give directions to the bank clerk or agent as to what should be done. On the contrary, for all that appears, the bank clerk would not have recognized their authority, or permitted their interference. Entertaining some doubt as to the proper course to be taken, a solicitor is referred to by the bank clerk for advice. There must be some misapprehension as to his reply, which is stated merely to have been to "call at Clarke's last place of residence, serve Mr. Boulton with the usual notice, as also the other indorsers, and ascertain from some of the merchants where he (Clarke) has removed to;" because, if all this had been done, and it is said to have been done, it would not amount to a presentment and until presentment the *usual* notice could not have been given truly; though in fact it was given, and stated what was not true, according to Mr. Ruthven's evidence—namely, that the note had been presented at the residence of Charles Clarke at Cobourg, and payment demanded and refused. From all this evidence, however, it seems to me quite clear that the

bank clerk thought the note was the property of the defendants, and could have drawn no other conclusion, and therefore he added to his notice of non-payment, that "this bank" (the defendants) "therefore looks to you for payment thereof, as such indorser."

All these facts confirm me in the opinion, that, in receiving this note for collection, the defendants, notwithstanding their notice, felt and understood that they engaged to do whatever was indispensable for the collection of the money, and they therefore sent it to their agent as a note to the proceeds of which they were entitled. If there was any intimation from which it was known to the agent at Cobourg that the note was only sent down for collection, not for the defendants, but for some customer of theirs, it does not appear in evidence.

If it was the defendants' duty, under the circumstances, to have presented the note, it is quite clear that they failed in performing that duty. The duty of presenting such a note to the maker, in order to charge the indorser, is so obvious, and falls so completely within the ordinary business of the defendants that it is unnecessary to dwell on it. The knowledge of the necessity of presentment is beyond question. The entire omission to present would therefore amount to gross negligence.

In the view I take of the case it was not necessary for the plaintiffs to set forth this notice in the declaration, for it amounted only to a special exception, not applying to the circumstances under which the action is brought.

In my opinion, therefore, the plaintiffs are entitled to a verdict on all the issues on the first count of the declaration.

There are no cases expressly in point, but I refer to the following as elucidating and supporting the principles on which my conclusions are founded—*Shiells v. Blackburne*, 1 H. Bl. 158; *Van Wart v. Woolley*, 3 B. & C. 439; *Shaw v. York and North Midland Railway Co.*, 13 Jur. 385; *Chippendale v. Lancashire and Yorkshire Railway Co.*, 15 Jur. 1107.

Judgment for the plaintiffs.

MOORE V. BOULTON,

Action on covenant for quiet enjoyment—Whether public highway an incumbrance.

The plaintiff sued the defendant on the usual covenant for quiet enjoyment contained in a deed, alleging as a breach that before the conveyance there was, and still is, a common and public highway over a portion of the land conveyed :

Held, on demurrer, declaration bad ; for the exception in the covenant for title of any limitation, proviso or condition, contained in the original grant from the crown, extends equally to the covenant for quiet enjoyment, and it was averred that no highway was reserved in the original grant.

And *semble*, that at all event the action could not be maintained, for such a highway is not an incumbrance with the meaning of the covenant.

The defendant in this case, on the 15th of February, 1846, conveyed to the plaintiff the north three-quarters of lot 21, in the first concession of Haldimand, containing one hundred and fifty acres, more or less, with no more particular description ; and covenanted that he was at that time lawfully and rightfully seized of a good, sure, perfect, absolute, and indefeasable estate of inheritance in fee simple, of and in the land, tenements, hereditaments, and all and singular other the premises therein described, and of and in every part thereof, without any reservation, limitation, proviso, or condition, *other than those contained in the original grant thereof from the crown* ; or any other matter to alter, change, charge, incumber, or defeat the same ; and that he had then good right to convey and confirm the said lands and every part thereof, with the appurtenances, to the plaintiff, his heirs and assigns, in manner and form aforesaid ; and that it should be lawful for the plaintiff, his heirs and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess, and enjoy, the said land thereby conveyed, or intended so to be, without the let, suit, interruption, hindrance, or denial of the defendant, his heirs or assigns, or any other person or persons whomsoever, and that free and clear, and freely and clearly acquitted, exonerated, and discharged, of and from all arrears of taxes, &c., and from all former conveyance, mortgages, rights, annuities, judgments, executions, and recognizances, and of and from *all manner of other charges or incumbrances whatsoever*.

The plaintiff charged, as a breach of these covenants, that from the time of making the indenture hitherto, he did not,

nor could, lawfully, peaceably and quietly enter into, have, hold, use, occupy, possess, or enjoy, the aforesaid lands, tenements, &c., thereby conveyed or intended so to be, with the appurtenances, without the interruption, &c., of the defendant, his heirs and assigns, *or any other person or persons*, and that free and clear, &c., (as in the covenant, of and from all former conveyances, &c., and of and from *all manner of other charges or incumbrances whatsoever*; because, he saith, that long before the said indenture—viz., on the 1st of January, 1820, and from thence hitherto—there was and still is a common and public highway over, through, and along a portion—to wit, ten acres of the said land—for all the liege subjects of the Queen to go, return, pass, &c., on foot and with cattle and carriages, at all times, at their free will and pleasure; and that divers of the said persons have, during all that time aforesaid, to the time of the commencement of this suit, passed over and along the said common highway with their carriages, &c., against the will of the plaintiff, contrary to the said covenants of the defendant.

The defendant demurred to the declaration, assigning for causes—that it shews no breach of covenant; that it does not appear that the plaintiff did not know of the right of way when he took the conveyance, and that it must be assumed that he took it subject to such right; that it is not shewn that there is any lawful highway over the said land, such as the plaintiff is bound to submit to; and that, at any rate, such highway, if it does exist, forms no incumbrance, and constitutes no breach of the covenants.

Vankoughnet, Q. C., for the demurrer.

Cameron, Q. C., contra, cited *Wotton v. Hele*, 2 Saund. 175, *n.*; *Andrews v. Paradise*, 8 Mod. 319; *Edwards v. McLeay*, 1 Coop. 308; 2 Swan, 287, S. C.

ROBINSON, C. J., delivered the judgment of the court.

This demurrer brings up what I take to be a novel question of some difficulty, and of very extensive interest. We all know the cases to be very numerous, in which—under by-laws passed by municipal bodies of late years, or under acts of the justices of the peace under our former law, or by the effect of the statute of 1810, which confirmed all

roads on which statute labour had been applied—highway have been established, either wholly or in part over the property of individuals; and where the proprietor has afterwards, either in ignorance of the fact or in disregard of it, sold or conveyed the lot which has been so encroached upon—in some cases, perhaps, to a person who knew of the encroachment, in other cases to a person who was not aware of it. I cannot call to mind that in any one of these cases that has come under my observation, the conveyance has made any mention of the highway, guarding the covenant by any reservation or exception on account of it. Nor do I remember that the existence of the highway has in any such case been made the ground of complaint in an action for breach of covenant. Yet, if the plaintiff can recover on this record, it must follow that in the numerous cases I have alluded to, where the grantor has given the ordinary covenants which are contained in this deed, the grantee could support an action.

Apart from what may be the strict rule of law, which, if we can arrive at it, must govern us in disposing of this demurrer, I confess it seems a perplexing question what line reason should suggest to courts of justice as the most proper to be followed in such cases.

If we take the instance of a man owning a town lot one hundred feet wide, or even less, through which, under some public authority, a new road has been laid out and established, he might not be aware of the facts if he lived abroad, or he might inadvertently or intentionally, omit to allow for it in making the conveyance; and the bargainee also might be ignorant of the fact till he had paid the money and taken his deed. In such a case, the road being taken out would leave little to be enjoyed by the grantee; and if he could obtain no redress by action on his covenant for title, or for quiet enjoyment without incumbrance, he would be deeply injured, supposing that no remedy was open to him by which he could obtain adequate redress.

On the other hand, in a case like the present, where, on account of the public allowance being unsuitable, or from some other cause, a road has been laid out encroaching upon

a lot of two hundred acres in the country, the real injury to the proprietor may be trifling, and in some cases the road may be an advantage to him.

Yet we can found no principle on these varieties of circumstances. Courts of law can make no distinction, according as the injury may be much or little, any further than as it may be allowed to effect the *quantum* of damages to be given for the breach. If the covenant must be admitted to be broken, the right of action must follow,

As to the circumstances of the covenantee having notice of the incumbrance, (treating the road as an incumbrance), at the time of his taking the title—that, in a court of law, could hardly, I think, be allowed to have any effect on the right of action, unless it could be shewn that the covenantee knowing it, and the covenantor being ignorant of the fact of the road being on his land, the latter had been fraudulently induced by misrepresentation to enter into the contract. In equity, I assume, redress could be obtained; and if the grantee had notice of the incumbrance, he would not be allowed to avail himself of the covenant.

It is one of the grounds of demurrer in this case, that the declaration does not state whether the plaintiff had notice of the highway or not; but I do not think that objection tenable; for when a man gives a covenant, he must take care at his peril that he is safe in what he engages for; and I take it not to be a defence at law that the covenantee knew he was stipulating for what could not be made good.

Then how is the law in such a case upon the main point, whether the existence of the highway constitutes an incumbrance within the meaning of the covenant.

On the argument, I understood one of the learned counsel to say that it would appear from a note to the American edition of Saunders' Reports, vol. 2, case of Wotton v. Hele, that the very question presented by this record had been under consideration in the American courts; but I do not find any trace of it in the American edition of Saunders to which I have referred, and I find but little that bears upon the point in English authorities. It is the covenant for quiet enjoyment that the plaintiff complains has been broken;

and looking at the terms of the covenant as set out, the question is, whether a covenant that the grantee shall "quietly enjoy, without the let, hindrance, interruption, or denial of the defendant, or any other person or persons whomsoever, free and clear from all manner of charges or incumbrances whatsoever," is proved to be broken, by shewing merely that, before the conveyance made, there was and still is a common public highway through and along a portion of the tract conveyed, for all the Queen's subjects to pass with horses, carriages, &c., without shewing the origin of the road, whether by reservation in the king's grant, by an act of the legislature or of the government, or of any competent authority, or by operation of law or by the grant or dedication of the grantee or any former proprietor of the land.

First, as to the covenant—It plainly is not absolute, but is so far qualified that the grantor saves and accepts any reservation, limitation, or condition contained in the original grant from the crown; and that saving, I think, extends not only to the covenant for title, but equally to the covenant for enjoyment. For anything that we say, there may have been a public allowance for a highway embraced within the lot and the patent may have expressly named it or referred to it, as many patents do.

I think, as the qualification is in the same sentence with the covenants, the declaration should have averred that there was no highway reserved or specified in the original grant; for without that being negatived, there is no apparent breach. But on the main question, my opinion, at any rate, is, that, without more being shewn than is shewn here, there is no breach of covenant.

It is not stated that any person or persons have a right of way derived under a previous grant from the grantor, or any previous owner. It may be the common case of a highway laid down or established by public authority, without any concurrence of the owner of the land, and is expressly averred that it is a common highway for all the Queen's subjects.

In Sheppard's Touchstone, 172, it is laid down that, "if

A. grant white acre to B., and covenant that B. shall enjoy it against all incumbrances, and C. doth disturb him in the taking of common there, and this is a common which is against common right, and which he hath by prescription ; in this case, it seems, this is a breach of covenant. *But if it be of a common that is of common right, contra.*" For this is cited in a note Vin. Abr. Covenant, (A. a) 1 Wood, 415 ; Gilb. Covenant, ch. 31. And the learned editor, Mr. Preston, adds to the text, "for a common of common right is a charge on the land, and not an incumbrance on the estate or title." I think the alleged common highway comes within the same principle ; that it is not an incumbrance on the estate—that is, on the legal estate or title—since the fee may well be in the grantee ; and that, being of common right, it is not an incumbrance within the meaning of the covenant for quiet enjoyment, which is defined to be "an assurance against the consequences of a defective title, and of any disturbances thereupon."—Platt on Covenants, 312.

Judgment for the defendant on demurrer (a).

MILLS v. McBRIDE.

Recognizance of Bail—Action against one alone, where others bound.

Where an action was brought on a recognizance of bail against one of the bail alone, and it appeared by the declaration that others were jointly bound, it was held that the objection was fatal, and might be taken advantage of without a plea in abatement.

The plea in this case was clearly bad.

Debt on a recognizance of bail, entered into by the defendant together with J. K. and D. P., as bail for the said

(a) In a recent American treatise, Rawle on Covenants for Title, 115, 120, the question brought up in this case is fully considered. The authorities in their courts are conflicting. In Massachusetts and the New England States, a public road has been held an incumbrance. In Pennsylvania clearly not ; and Kennedy, J., in delivering the opinion of the court there expressed his astonishment that a highway should ever have been imagined to be an incumbrance within the covenant. In New York the point has not been directly decided ; though one of the judges expressed a strong doubt as to the right of action in such a case. Mr. Rawle says, referring to the case in Pennsylvania, "the doctrine seems perfectly correct when applied to a case of a road actually laid out, dedicated to public use as a highway, and opened—in such case there would appear as little reason to call it an incumbrance as there would be to call by that name a ledge of rocks, a marsh, or any similar incident to the land which lessened its value."

D. P. in a suit brought against him by this plaintiff in the then District Court of the Home District.

Plea—That no writ of *ca. sa.* was issued as in the declaration mentioned, before the recognizance was entered into.

Demurrer, because the defendant is estopped from denying that the writ of *ca. sa.* was issued, and because the plea is argumentative and uncertain.

Joinder in demurrer, with notice of the following exception to the declaration—that it appears by the said declaration that there other parties joined with the said defendant in the said recognizance, against whom the plaintiff should have proceeded in this action jointly with the defendant, as jointly liable with him upon the same.

Phillpotts for the demurrer.

M. C. Cameron, contra, cited *Rex v. Young*, 2 Anst. 448; 1 Saund. 291, *c.*; *Read v. Pope*, 1 Cr. M. & R. 302.

ROBINSON, C. J., delivered the judgment of the court.

We think the plea is undoubtedly bad, though not on the ground of the defendant being estopped by executing the bond from denying that a *ca. sa.* had issued; for the bond and condition as set out contain no recital or assertion that there was any such writ; but it is bad as being uncertain, and involving a negative pregnant.

The defendant's counsel did not indeed argue in its support, but took an exception to the declaration, that the plaintiff cannot sue one of the bail alone, upon a recognizance by which it appears the three were bound jointly; and he also excepted that the declaration should have averred the suit in which bail was given to be within the jurisdiction of the District Court.

We think the first of these objections is fatal. As this recognizance is set out, it is a joint recognizance; and that being so, one of the cognizors cannot be sued upon it alone, without its being shewn in the declaration for what reason the others are not sued. I refer to *Osborne v. Crosbern*, 1 Sid. 238; *Cabell v. Vaughan*, Ib. 420; *Blackwell v. Ashton*, *Alleyn* 21, *Styles* 50, S. C.; *Cocks v. Brewer*, 11 M. & W.

51 ; and to the cases which were cited on the argument. The distinction is explained in *Blackwell v. Ashton*, where a *scire facias* was brought against three bail upon a recognizance acknowledged by them and the principal jointly and *severally* ; and upon demurrer it was held ill, " because this being founded upon a record, the plaintiff ought to shew fourth the cause of the variance from the record, as that one was dead ; but if an action be brought upon bond in the like case, there the defendants ought to shew that it was made by them and others in full life, not named in the writ, because the court shall not intend that the bond was sealed and delivered by all that are named in it, and therefore the defendants cannot demur upon it though it be entered in *hæc verba*." It is true that this was a declaration on *sci. fa.*, and is to be looked upon, therefore, as a *quasi* continuation of a matter of record, in order to have execution thereon ; and that it must appear to be consistent with the record.

This is an action of debt on the recognizance, not a proceeding by *sci. fa.* and the question is, whether it should be pleaded in abatement. This was contended in the case of *Cocks v. Brewer*, which, however, was debt on a judgment, and not founded immediately on the record, but on the consequent duty to pay the debt. On considering the arguments and judgments in that case, and the note in *Saunders* to the case of *Cabell v. Vaughan*, vol. 1, p. 291, note c., we think we must hold that this action—being founded directly on the recognizance, and the plaintiff's declaration shewing that there is another cognizor who is not sued—the objection is fatal without any plea in abatement, for that we see by the record that all were bound, and we are to presume, in such a case, that all are living, till the contrary be averred. There is no necessity, therefore, for the defendant to plead that there was another bound, who is still living, and within the jurisdiction of the court. We think, when we examine our Joint Obligator Act, we see that it contains provisions shewing that the Legislature did not contemplate its applying in such a case as the present, but only in cases of

contracts between party and party. Upon this exception, therefore, we think the defendant is entitled to judgment.

Judgment for defendant on demurrer.

DOE DEM. FORSYTH V. QUACKENBUSH.

Will—Construction.

W. F. died in 1841, leaving a will as follows :—

“I will and devise unto my son C. F., all and singular that farm, &c., the same to be by him the said C. F., peaceably possessed and enjoyed for and during his natural life; and after his decease I will and devise the same to the heirs of the said C. F., and to their heirs and assigns forever; * * * * and in the event of either of my sons C. F., I. B. F., or R. F., or either of my daughters, S. F. or M. F. dying *before they come of lawful age, or without lawful issue*, then, and in such case, the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike.”

C. F. died at the age of thirty and unmarried.

Held per Cur., that the plaintiff, as heir-at-law of the testator, could not recover.

The opinion of the Chief Justice upon the construction of the will was, that the word “or” should be read “and”; and that C. F. took an estate in fee, subject to an executory devise over, in case he should die under age, and without issue.

BURNS, J., considered that the will should be read without alteration; that C. F. took an estate tail, and therefore that on failure of such estate, the devise over took effect.

Ejectment.

Upon the following statement of facts a verdict was taken for the plaintiff, subject to the opinion of the court.

William Forsyth died in possession of the *logus in quo* having made his will, duly executed, by which he devised, among other property, the lots which form the subject of this action to his son Collingwood Forsyth, in the terms of the will put in.

Collingwood Forsyth died in September, 1850, aged about thirty and unmarried. William Forsyth, the testator, was twice married; by the first marriage he had several children. The eldest son by that marriage, went to the United States, unmarried, upwards of twenty years ago, and has never been heard of since. The second son married, left issue, and died intestate in the spring of 1850; and his eldest son is the plaintiff in this action. By the second marriage the testator had also several children, of

whom Nelson Forsyth, still living, is the eldest, and Collingwood Forsyth, the devisee, was the second.

William Forsyth, the testator, died in 1841.

Rodney Forsyth (named in the will) died after the testator, under age, and without issue; Isaac Brock Forsyth died also of full age, leaving issue; Melissa Forsyth also died of full age, leaving issue; and Sophronia Forsyth is alive.

The following are the clauses having particular reference to this case, taken from the will of William Forsyth:—

“Secondly, I will and devise to my son, Collingwood Forsyth, all and singular that farm or tract of land and premises situate, lying, and being in the township of Bertie aforesaid, being composed of lot number seven, in the first and second concessions of said township of Bertie, containing two hundred and sixteen acres, be the same more or less; *the same to be by him, the said Collingwood Forsyth, peaceably possessed and enjoyed, for and during his natural life; and after his decease I will and devise the same to the heirs of the said Collingwood Forsyth, and to their heirs and assigns forever.* In consideration whereof I will, order, and direct, that he, the said Collingwood Forsyth, shall pay, yearly, and every year, unto his mother, Jane Forsyth, the sum of twenty-five pounds currency of this province, during her widowhood, and also that he shall pay to his sister Melissa the sum of twenty-five pounds currency of this province yearly, and every year, so long as she shall remain single.

“And in the event of either of my sons Collingwood Forsyth, Isaac Brock Forsyth or Rodney Forsyth, or either of my daughters, Sophronia Forsyth or Melissa Forsyth, *dying before they come of lawful age, or without lawful issue*, then, and in such case, the legacies herein devised and bequeathed to them, shall be equally divided amongst the surviving ones, share and share alike.”

The questions for the opinion of the court upon the facts stated and the terms of the will are,

1st—Whether or not the plaintiff is entitled to recover in this action, as the owner in fee, or otherwise, of the premises in question;

2nd—Or whether the premises passed under the devise over, contingent upon the death of Collingwood Forsyth under age and without issue: or,

3rd—Whether Nelson Forsyth is entitled to the premises as heir-at-law of the said Collingwood.

Judgment for the plaintiff or defendant or nonsuit to be entered, as the court may direct.

Vankoughnet, Q. C., for the plaintiff, cited *Hope ex dem. Brown et ux. v. Taylor*, 1 Burr. 268; *Walsh v. Peterson*, 3 Atk. 192; *Soulle v. Gerrard*, Cro. Eliz. 525; *Miles v. Dyer*, 5 Sim. 435; *Doe dem. Usher v. Jessep*, 12 East 288; *Bawsey v. Lowdall*, Styles, 249; *Whiting v. Wilkins*, 1 Buls. 219; *Baldwin v. Smith*, 1 Co. 66; *Brice v. Smith*, Willes, 1; *Fitzgerald v. Leslie*, 3 Br. Parl. Ca. 154; *Willis v. Hiscox*, 4 Mil. & Cr. 197; *Doe dem. Cannon v. Rucastle*, 8 C. B. 876; *Simpson v. Ashworth*, 6 Beav. 412; *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636.

Cameron, Q. C., for the defendant, cited *Mortimer v. Hartley*, 6 C. B. 819; 11 Jur. 582, S. C.; 20 L. J. (Ex.) 129, S. C.; 6 Ex. 47, S. C.; *Ram. on Wills*, 90.

ROBINSON, C. J.—When the testator had by his will devised the land in question to his son Collingwood, *to hold during his life, and after his decease to his heirs, and to their heirs and assigns forever*, if the will had stopped there, the effect would have been the same as if he had said nothing about Collingwood holding during his life, but had in the ordinary language devised to him, his heirs and assigns. Then, if he had added nothing more than this—that if his son Collingwood should die without issue the land should be equally divided amongst the testator's surviving children, it must inevitably have been held that under such a devise, Collingwood took an estate tail, as in the cases of *Doe dem. Cadogan v. Ewart*, and *Bryce v. Smith*, cited on the argument; for the estate could never go to his heirs general, if on the single contingency of his dying without issue the devise over must take effect; but as the will stands we have a contingency with a double aspect, and the land is not to go to the other children of the testator, unless Collingwood should die under age, *and without issue*—not

that the will says so in words, for the literal direction is, that if he should die under age, *or* without issue, the devise over should take effect, but the authorities are conclusive that we must read *and* for "*or*" in this case, and that was admitted on both sides in the argument. Though this seems to be taking rather an unwarrantable liberty with the will, yet the reasons which have led to such a rule of construction are convincing; and there can be no doubt that, in this case as well as in others of the same kind, the effect of which is thus given to the will is that which the testator intended, while a strict adherence to the words would defeat his intention. It is evident, I think, that the testator meant to give the land to Collingwood, to be held absolutely as his own in fee, if he lived to be twenty-one, or if he should die leaving issue; but he desired to provide for the possible case of his dying before he was of capacity to devise, and leaving no children, in which case the testator meant to resume, as it were by anticipation, the disposal of the estate, rather than it should be left to descend wholly to that one of his the testator's children who would be Collingwood's heir.

I take it to be clear, on the authority of several adjudged cases, that this is the construction which we are to carry into effect; and this being so, Collingwood took an estate in fee simple, subject to an executory devise over in case he should die under twenty-one, *and* without issue. Then, when he had attained the age of twenty-one, and the contingency could not happen on which the devise over might take effect, the estate which he had taken as by purchase became absolute in him in fee simple, and on his dying intestate went to his heir, that is Nelson Forsyth, his brother of the whole blood. If he had taken an estate tail by the will, the land would now, from failure of issue, have been vested in Walter Forsyth, as heir of the devisor. I refer to *Eastman v. Baker*, 1 Taunt. 174; *Price v. Hunt*, Pollex. 645; *Collenson v. Wright*, 1 Sid. 148; and to *Walsh v. Peterson*, cited on the argument (a).

(a) See *Jarmin on Wills*, 2nd Am. Ed. vol. I, 440, 450.

DRAPER, J.—I concur entirely in the opinion that the plaintiff in this case is not entitled to succeed; and I do not go further at present in determining any of the questions raised, than to say that, if under the circumstances the heir of Collingwood Forsyth is entitled to the land, and not the devisees over—that his eldest brother of the whole blood and his heirs will take as heir to Collingwood.

BURNS, J.—Whatever the ultimate result may be as between the different parties, it appears to me quite clear that the plaintiff in this case is not entitled to recover the estate. Before he can succeed he must take out, not only that the devise to Collingwood Forsyth was an estate tail, and that that estate has failed by reason of a failure of heirs to support and carry on such estate, but also that the devise over to the other sons and daughters of the testator, in case of failure of the estate to Collingwood and the heirs of his body, was upon a contingency which never happened.

I agree with the argument for the plaintiff, that Collingwood Forsyth took an estate tail in the premises devised. The effect of the first clause of the will in his favour, if that had stood alone, would have been to give Collingwood an estate in fee; for though the testator expressed himself that Collingwood was to possess and enjoy the premises during his natural life; yet when he added the words “and after his decease, to the heirs of the said Collingwood, and to their heirs and assigns forever,” the life estate would be merged in the larger estate conferred. There are two reasons apparent upon the face of the will why the testator did not mean heirs general—that is, collateral as well as lineal—but that he meant the first expression “heirs of the said Collingwood” to be restricted to heirs of his body. The first reason is, that in the subsequent clause of the will the testator provides for the contingency of Collingwood dying without lawful issue, in which case there is a devise over. This expression has always been received to interpret what meaning a testator has attached to the word “heir.” All the issue of Collingwood might in turn be heir to him; and therefore, to carry out that effect, it is

necessary that he should take an estate tail. A second reason is, the limitation over to the brothers and sisters of Collingwood in case he should die without lawful issue. They or some of them would, or might be heirs to him, under the general limitation to him for life, and to his heirs after his death, but being specially named to whom the estate is limited if Collingwood should die without lawful issue, is a reason for supposing that the testator did not consider they would take under the other clause, and consequently the limitation to the heirs of Collingwood, means heirs proceeding from his body.

These positions are, I think, fully supported by the cases of *Doe Ellis v. Ellis*, 9 East. 382; *Doe Atkinson v. Featherstone*, 1 B. & Ad. 944; *Doe. Todd v. Duesbury*, 8 M. & W. 514, and the cases there cited.

This position—that Collingwood Forsyth took an estate tail—instead of helping the plaintiff in his action, in my opinion, is destructive of his claim. It is necessary that the plaintiff should make out, before he can claim as heir-at-law of the testator, that no estate passed, or can now pass to the devisees over; that is, that the contingency upon which they were to take never arose, and consequently the devise in their favor has altogether failed. In order to sustain this view, it is necessary he should sustain the position, that the will—where it expresses that in the event of Collingwood dying before he comes of lawful age, or without lawful issue—meant in no event to pass over his issue, and therefore that the word “or” must be read “and;” for otherwise, in the event of Collingwood having issue, and dying under twenty-one, they could not take by virtue of the devise. It is quite correct that if the word “or” is to be construed in its grammatical sense, such result must follow, though we might be convinced the testator did not suppose he used language which would have that effect. In his will he has used language which compels me to say, (notwithstanding that he seems to think he gave to Collingwood only a life estate), that an estate tail was conferred according to the doctrine in *Shelly's case*, and which is a rule of law, not of construction. There are

many cases to shew that, if it were necessary to establish that Collingwood and his heirs took a fee-simple, then, rather than that should fail, the word "or" would be construed as "and." If we construe "or" in this instance to mean "and," the result must be that the devise over could only take effect in case the compound proposition happened—namely, Collingwood dying under twenty-one, and also without issue. As a speculative idea on the subject it may be asked, did the testator mean that unless both events happened, it was intended as respects the premises in question, that he should be intestate if the estate tail failed? or did he mean that, in case *at any time* of Collingwood dying without issue, the estate should go over to the other devisees? I have no doubt in my own mind that it was the latter he really intended; but it is quite true that such construction must have the effect of saying that in case Collingwood died before twenty-one, and leaving issue, that such issue could not take the estate unless the will be read, as interpolating the words "*at any time*" before the words "*without lawful issue.*" It is unnecessary to say whether the will shall be read with such interpolation or not, because by giving to the word "or" its grammatical construction in the sentence as it stands, the effect is that the devisee over takes effect, there being no issue of Collingwood. The object of changing the construction of the word is to carry into effect the obvious, clear, presumed intent of the testator, but not otherwise. It is said that, in case of an estate tail, the word "or" will not be construed "and," because it may be as well presumed the testator meant the devise over to take effect in case of the event happening, as to presume that the heirs or issue of the first devise should take, and in such case there will be no presumption against the obvious meaning of the words used; and with regard to such devisees, a different rule prevails than when the question is, whether an estate in fee or not passed. Whether such reasoning will ultimately prevail, or whether the interlopation I have before stated will be made, when such a case may arise as to call for a decision between the devisees over and those claiming under the entail, on a

devise like the one in question, calls for no remark now. The plaintiff's position is that of claiming adversely to the devisees over, upon the strength of the proposition that the Court will inevitably so construe the will as to suppose the testator did not mean to pass over the issue of Collingwood in any event. Authority, in my opinion, is against that view, and, independently of authority, I am not prepared to say the testator must necessarily have meant that the issue of Collingwood, if he died having issue, under twenty-one, should take the estate. He, the testator, might have desired that his son should not marry under that age, and by this devise, as contained in his will, have without directly forbidding such marriage, evinced to him that, if he did marry and have issue, and was so unfortunate as to die under age, yet that such issue should not inherit. The will, as it is, is capable of being construed sensibly as a mere matter of fact; that is, if Collingwood died under twenty-one, or without lawful issue, then the devisee over took effect, and no hypothesis is necessary; but if we change the word "or" into "and," we still have the fact that the devise over was only to take effect in case Collingwood died without issue, but it would be limited to his doing so within the age of twenty-one; and then we must, to make the change, believe that the testator so intended, and that he intended in such event, and failing the limitation to Collingwood, to be intestate as respects this property. If it be true, as the plaintiff contends, that it is absurd to suppose the testator intended the issue of Collingwood to be disinherited on a certain event happening, it is equally absurd to suppose he intended to give the estate over upon an event very unlikely to occur; and if it did not occur, and the first devise failing, that he intended to be intestate respecting this portion of his property. I can see no reason for destroying one hypothesis by building up another, when the one sought to be destroyed may be as near the truth.

The one view is as conjectural as the other, and it is not the duty of the Court to speculate upon what might have been the testator's intent; but if the words used have a clear meaning, though that meaning may, in our opinion,

lead to something which we might think rather absurd, yet we cannot say but the testator might have intended the very thing which we think absurd.

I am of opinion that the will should be read without making any alteration; the effect of which is that the devise over took effect upon the failure of the estate tail.—*Vide Woodward v. Glasbrook*, 2 Verm. 398; *Brownsword v. Edwards*, 2 Ves. sen. 243.

Judgment for defendant.

CAREY ET AL. V. BOSTWICK AND HIGGINS.

Replevin—Avowry under distress for rent—Eviction by paramount title—Evidence—Plea of "non tenuit."

In an action of replevin, the defendants avowed under a distress for one quarter's rent, due to S. B., one of the defendants, on a demise to the plaintiffs at a quarterly rent. The plaintiffs replied, 1st, *non tenuerunt*; 2ndly, That the said S. B. had previously leased a portion of the premises demised to them to one Parker, for a term unexpired, and that Parker evicted the plaintiffs. To the last plea the defendant rejoined, that the plaintiffs voluntarily delivered up possession of such portion to Parker, and elected to remain as tenants of the remainder, for the time and at the rent in the avowry mentioned.

It was proved that Parker, having a lease from S. B., including a narrow strip of land demised to the plaintiffs, and which had been used by them as a passage to the rear of their premises, began, about the middle of the quarter previous to that for which the rent was claimed, to put up a building which covered such passage; that in lieu of that entrance another was opened on the north side of the house, on land belonging to S. B., and paved with boards taken from the old passage; that the men who did this work were employed by the plaintiffs at Parker's request, and were sent by them to him to be paid; that this change of the passage was proposed by the plaintiffs, as they said it would answer them as well. After it was made the plaintiffs paid the rent for the following quarter, claiming no deduction. When the next quarter's rent fell due they refused to pay, claiming an abatement for alleged injuries caused by the erection of Parker's new building, but not for the obstruction of the passage-way. This was refused, as a separate action was pending for those injuries. The defendants discontinued, and thereupon this action was brought.

Held—That the defendants could not support their avowry as for rent reserved on the whole of the premises under the original letting, for no interest passed to the plaintiffs in that part which had been previously demised; that the plaintiffs were not precluded by their assent from setting up an eviction by paramount title which they could not have restricted; and that, under the pleadings, they were therefore entitled to a verdict.

ROBINSON, C. J., *dissentiente*, on the ground that the evidence of consent on the part of the plaintiffs was sufficient to warrant the jury in finding that there was no eviction; and that the arrangement between Parker and the plaintiffs did not put an end to the original lease so as to prevent the defendants from avowing under it.

Replevin.

Plea—Avowry, for distress for rent under a demise by

defendant, Mrs. Sarah Bostwick, to the plaintiffs, of a dwelling house and barber's shop, at the quarterly rent of 10%, payable on the first of August, 1st November, 1st of February and 1st May in each year, so long as the plaintiffs should remain quarterly tenants of the said dwelling house and barber's shop; stating that 10% of the rent for one quarter, ending on the 1st of February, 1852, was in arrear, wherefore she and the defendant Higgins, as her bailiff, entered and distrained, &c.

Plaintiffs replied, 1st, "*non tenuerunt*," in the common form.

2ndly, That Mrs. Bostwick, after the demise, and before any part of the said rent became due—namely, on the 1st of September, 1851—evicted the plaintiffs from a certain passage-way, being part of the premises demised, and kept them so evicted and expelled until, and upon, and after the 1st of February, 1852.

3rdly, That before Mrs. Bostwick made the demise in the plea mentioned—namely, in May, 1849—she demised a certain passage and yard—being parcel of the premises demised, as in the avowry mentioned—to Reuben A. Parker, for a term yet unexpired; and the charging eviction of the plaintiffs from the said passage and yard by Parker, claiming under the said demise made to him on the 1st of September, 1851; and that he kept out the plaintiffs till, and at, and after the 1st of February, 1852.

The defendants rejoined to the 2nd plea, that before the demise in the avowry mentioned—namely, on the 1st of September, 1851—it was agreed between the plaintiffs and Sarah Bostwick, that the plaintiffs should forthwith quit and deliver possession of the passage and yard in the second plea to the avowry mentioned, to her, Mrs. Bostwick, and that the plaintiffs should continue to hold the residue of the premises demised for the time and at the rent in the avowry mentioned; and that in pursuance of such agreement, the plaintiffs did quit and deliver up possession of the passage and yard to her, and continued her tenants of the residue of the premises demised, for the term and at the rent aforesaid—specially traversing that Mrs. Bostwick

evicted and expelled the plaintiffs, as stated in their plea; concluding to the country.

And they replied to the plaintiffs' third plea, that before the demise in the avowry mentioned—namely, on the 1st of September, 1851—the plaintiffs voluntarily abandoned and delivered up possession of the passage and yard to Reuben A. Parker, and elected to remain as tenant of the defendant Bostwick, of the dwelling house and barber's shop, for the time and at the rent in the avowry mentioned—with a special traverse that Parker ejected, expelled, &c., the plaintiffs from the possession of the said demised premises in manner and form, &c.; concluding to the country.

At the trial, at Toronto, before Robinson, C. J., a verdict was found for the defendants on all the issues.

M. C. Cameron obtained a rule *nisi* for a new trial, on the law and evidence, and for misdirection.

Hector shewed cause.

The facts of the case appear in the judgment. In addition to the authorities there cited *Styles*, 432, 446; 1 *Leon* 110; *Hunt v. Cope*, Cowp. 242; *Burn v. Phelps*, 1 *Stark.* 94, were referred to in the argument.

ROBINSON, C. J.—Whether it is proper that this verdict should stand or not, depends, I think, on our opinion of the application of the evidence to the issue taken upon the last plea.

If what was proved amounted to an eviction, either by Mrs. Bostwick or by Parker, still it could not properly be given in evidence under the plea of *non tenuerunt*—for eviction requires to be specially pleaded. It was not contended at the trial, nor, I think, on the argument of this rule, that the plaintiff was entitled to a verdict on the plea of *non tenuerunt*.

Then as to the second plea—that Mrs. Bostwick evicted the plaintiffs—that was not proved; and so any question must be confined to the effect of the evidence under the third plea.

This plea is well adapted to the defence which is set up, and the only question is whether the facts proved sustain it. The circumstance of Mrs. Bostwick having made the previous lease to Parker, for a term which is not yet expired,

would not of itself have disabled her from enforcing her claim for rent, so long as these plaintiffs had not been disturbed in the enjoyment of any part of the premises included in the lease to them : for all that the plaintiffs could then have alleged would have been, that she had no right to demise, and that would have been no defence to the plaintiffs, while they were actually enjoying, under their lease, all that had been demised to them. The plaintiffs, therefore, felt it necessary to set up the further fact, that Parker by virtue of the lease which Mrs. Boswick had made to him, expelled them from the possession and kept them out until after the time of distress.

If that can be held to have been proved by the evidence, then the legal effect would be that the rent was suspended ; and while the plaintiffs continued so expelled from any part of these premises, however small by a person claiming under a previous lease from Mrs. Bostwick, she, (Mrs. Bostwick) would be as much disabled from distraining as if she had herself entered and wrongfully expelled the plaintiffs. And the effect would be the same, I think, if the plaintiffs, on possession being demanded by Parker, had submitted to his claim without resistance, as if he had expelled them by an action.

The evidence, however, in the case was, that Mr. Parker, holding his lease from Mrs Bostwick—which embraced a narrow strip of land, south of the house that had been demised to the plaintiffs, and which they had used as a passage-way to the rear of their premises—commenced in September, 1851 (which was in the middle of the quarter previous to that in wich the rent now in question is claimed) to put up a building occupying the whole front on Yonge Street of the land that had been demised to him, and covering the passage-way mentioned in the defendants' third plea, and coming up to the wall of the house which the defendants were occupying under their lease.

It was proved that in lieu of the passage-way thus covered by Parker's new building, a passage was opened on the north side of the house, on land belonging to Mrs. Bostwick ; that the plank which had been laid down in the old passage-way was removed to this, and a gate made

opening into Yonge Street from the new passage-way. This was done upon an arrangement made between Parker and the plaintiffs. The men who did the work were employed by the plaintiffs at Parker's request, and were sent by them to Parker to be paid. Afterwards, on the 1st of November, 1851, when the rent for that quarter became due, the plaintiffs paid it according to the lease—without claiming any abatement and without complaint. The plaintiffs continued to occupy, using the passage on the north side of their house in lieu of that on the south, which had been covered by Parker's building: but on the 1st of February, 1852, when the next quarter's rent became due, they refused to pay it; whereupon Mrs. Bostwick distrained for the whole quarter's rent according to the lease and the plaintiffs replevied, and brought this action in consequence—setting up an alleged eviction or expulsion from the passage-way by Parker, under his lease from Mrs. Bostwick, as an answer to the defendants' avowry.

It was proved on the part of the defendants that it was the plaintiffs' own wish, or proposition that the passage-way should be made for them on the north in lieu of that on the south; that they said it would answer for them just as well; that they said nothing about any compensation being made to them; that they paid the first quarter's rent on the 1st of November, without asking for any abatement, though the alteration had been made during that quarter: and that, when the next quarter's rent was demanded, in February following, they asked to have an abatement made, not on account of the passage-way, but of alleged injuries done to them as occupants of the house, by their windows being darkened by Parker's new building, and from the roof and gable end of their house being damaged by the interference of Parker's building. For these alleged injuries, however, they had brought a separate action, and on that account Mrs. Bostwick's agent declined making any abatement—and in that action the plaintiffs afterwards recovered 5*l.* damages.

The plea to the avowry, which we are now considering, refers only to the alleged expulsion from the passage-way—

which expulsion the defendants denied. The jury were told that the mere fact of the prior demise by the lessor would not distinguish or suspend the rent, so long as the tenants enjoyed all the premises, and were not evicted by any one claiming under the demise; and as to the alleged eviction—if it were of part of the premises only, and the tenants remained in the enjoyment of the other part, and paid the full rent subsequently, assenting to the occupation by Parker of the one passage, in consideration of the convenience given them by making the other at his expense—such change, made with assent of the tenants, would not amount to an eviction, and would not work the entire extinguishment of the rent, so as to disable the lessor from distraining.

I believe this view of the law to be correct; for I find it laid down “that there shall be no extinguishment or suspension of rent when the whole is done by agreement, but only where the lessor enters injuriously and contrary to the will of the lessee.”—Crabbe on R. P. § 218.) If in any such case the parties agree to the change, and have an understanding that the rent shall continue as before, then there is no wrongful expulsion. Such an understanding might well take place without wrong to either party, and may be inferred from the conduct and declarations of the parties, without express evidence of a specific contract to that effect—as in this case from the fact of the payment of the full rent in November without objection, and the declarations of the plaintiffs that the passage on the other side answered them as well, and from their giving directions about making the change, and hiring the people to make it, and sending them to Mrs. Bostwick’s agent for payment, upon an understanding between them to that effect. It may be very true that Parker would have left them no choice if they had objected, for he had the prior right and could dispossess them by process of law; but we are not entitled to assume that he would. For all we can tell, if he had found them unwilling to accept the passage on the other side, he would have delayed his building till Mrs. Bostwick had put an end to their tenancy, rather

than to expose her to trouble. He had long abstained from interfering with the passage-way, though his lease included it, and he might have delayed still longer if he had been able to come to no agreement with the plaintiffs. What was proved was, that the plaintiffs were willing to give up the passage on the one side, on having one made on the other; and there was room for the jury to infer that they agreed to go on paying the same rent after the change as before. If they did, and if they acted upon that understanding, they could not acquire a new right by changing their minds afterwards. If the tenant in such a case voluntarily gives up to his lessor a portion of the land, receiving no equivalent, there would, as I suppose, be a suspension or extinguishment of the rent as regarded such part, not an extinguishment of the whole rent; because the lessor would have committed no wrong in entering with the lessee's permission, and the lessee could not be held to have been evicted or expelled—which always includes the idea of something done wrongfully, and against the will of the lessee.

In *Bac. Abr. Rent*, M. 1, it is said, if the lessee surrender part, the rent shall be apportioned.

“When the lessor takes a lease of a part of the land, or enters *wrongfully* into part, there is a variety of opinions, whether the entire rent shall not be suspended during the continuance of such lease or tortuous entry; and in the last case it seems to be the better opinion, and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend;” and again, “There is no color of reason why the whole rent should be suspended, when the lord or lessor takes a lease of part of the land, because here is the concurrence of the tenant, who, by his own act and consent, parts with so much of the land as is re-demised, and thereby supersedes the former contract as to that part; but since the obligation to pay the rent was by the first contract founded upon the consideration of the tenant enjoying the land, that obligation must still continue on the tenant

so far as it is not cancelled or revoked by any subsequent contract between the parties; and consequently, the whole rent shall not be extinguished by such re-demise, but the tenant shall pay rent in proportion to the land he enjoys, because the obligation of the first contract must subsist so far as the tenant enjoys the consideration which first engaged him in such contract." This I take to be the language of Lord Chief Baron Gilbert, and he cites the case of *Hodgeskins v. Thornborough* (reported in 3 Keble, 500, 505, 518, 541, 557; in 2 Lev. 143; *Freman* 404, and 1 Ventris 276, where A. leased for sixteen years, rendering 20*l.* a year rent, and the lessee leased a part to another for ten years, rendering no rent and such sub-lessee assigned his term to A., the first lessor, who entered; and the question was, whether A. could claim the whole rent, and the court held he could, "for that there could be in that case no suspension or extinguishment of the rent on account of the entering of the lessor, *for that is always where the lessor enters wrongfully against the will of the lessee.*"—(2 Lev. 143.) In Ventris's report of the case, Lord Hale is stated to have said that, "if the lessee re-demise part to the lessor, reserving a rent, there shall be no apportionment; for the parties, by the reservation, have ascertained what rent shall be allowed for that part; but where there is no rent reserved upon the re-demise, there shall be an apportionment. * * * If the lessor enters into part by wrong; this shall suspend the whole rent, for in such case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue, otherwise of a rightful entry into part; and his Lordship adds, "It is the common experience, that where it comes to be tried upon *nil debet*, if it be shewn that the lessor entered into part, to answer this by proving that it was the lease of the lessee; and if the law should not go upon this difference, it would shake abundance of rents, it being a frequent thing for a lessor to hire a room, or other part of the thing demised, for his conveniency." In *Freman*'s report of the same case, Lord Hale observes, that he had ruled it "upon evidence a hundred times, upon the issue *nil debet*, or *non*

expulit, (which latter is the very issue in the case now before us,) that if it appeared that the plaintiff entered *by the consent of the lessee, this was no such entry or expulsion as would avoid the payment of the rent*; and the contrary would be very inconvenient, for then the lessor could not take any conveniency from his lessee without suspending his rent. Now, I take the present case to come fully within the principle of this case of *Hodgeskins v. Thornborough*, provided the jury were satisfied that the lessees were content to accept what was done by the lessor, or Parker, as equivalent to the advantage of enjoying the small passage in question, and allowed him to place his building over the passage, without insisting on any diminution of the rent. It is no question for us, and was not a question for the jury, whether what was done on the one side was an ample equivalent for what was given up on the other—that was for the consideration of the parties themselves—it is enough if there was such an understanding. If it had been shewn in this case that, instead of the lessor's agent, or Parker, making the other passage, he had come to the lessees, and offered to rent from them for a few shillings the small passage in question, for as long a time as they might be allowed to retain the premises, and that the lessees had agreed to it, then it is clear there would have been no suspension of the rent, and the lessor might have distrained for the whole—and there would indeed be no sense or reason in the law if it were otherwise; but the lessees might take their compensation in any way they thought proper, as well as by rent, and the effect would be the same. The substance of the thing is, that, instead of being a wrongful expulsion, it would in either case be a mere waiver of the enjoyment as to that part of the premises for a consideration, thereby in effect placing the lessees in the same situation as if they enjoyed. If the rent is not in such a case extinguished, and that wholly, then it must follow that the remedy by distress remains.—*Bac. Abr. "Rent"* M., 3.

The plaintiffs however have contended, that the fact of

the lessor having made the prior lease to Parker disabled her of itself from enforcing the payment of the rent, without the necessity of the tenants' proving an eviction, and placed her on the same footing as if she had forcibly entered and expelled the plaintiffs; for that she had thereby placed the plaintiffs at the mercy of her first lessee, and enabled him to expel them at his pleasure: but in reason that consequence should not follow, any more than it would if the lessor knew that from any other cause she had no right to make the second lease; for it can amount to nothing more so long as the plaintiffs were not put out against their will. What we have to consider is, not what Parker or any other person had it in their power to do, but what they actually did. If Parker had come to the plaintiffs and shewed them his lease, and told them that he could turn them out at any moment, but that he would not do so, but would allow them to enjoy the passage so long as they held the house—which was only to be for a few months; and if the plaintiffs, knowing all the circumstances, instead of quitting, chose to remain, enjoying all the premises included in their lease, they could not resist the payment of the rent, or any remedy for enforcing it, on the mere ground that there was a person who had it in his power to expel them.—See *Alchrone v. Gomme*, 2 Bing. 54; *Hopcraft v. Keys*, 9 Bing. 616. And, on the authority of the cases which I have cited the plaintiffs have been no more expelled from this passage-way, within the meaning of that term—if it be true that they were consenting to the change that was made—than they would have been if they had continued to use the passage. That, at least, seems to me to be the reason of the thing.

The plaintiffs, however, rely on the case of *Neale v. McKenzie*, (1 M. & W. 747, 2 Cr. M. & R. 84), which is a case material to be considered in discussing this question, though I think that, for obvious reasons, it cannot govern our judgment in the present case, because both the pleadings and the facts prevent its applying. There *McKenzie* had leased to *Neale* 100 acres of land, having before made a lease of eight acres of the same parcel, for a term not yet expired, to another person, who had entered and was in

possession. The second lessee (Neale) entered under his lease on the other part of the land, and enjoyed it until the first half-year's rent became due, but he had no enjoyment of the eight acres, the first lessee being all the time in possession. McKenzie nevertheless distrained for his rent; and Neale brought trespass in consequence. McKenzie pleaded in justification his right to distrain for rent; and Neale replied, that the first lessee (one Charlton) was, before the demise to him (Neale), in possession of the eight acres, under a demise made to him by McKenzie, whereby he (Neale) did not and could not enter into possession, or enjoy the said eight acres, parcel of the land demised though he was willing and desirous of entering; and that he had been kept out by Charlton by virtue of the first lease, and had been prevented from receiving the profits. McKenzie rejoined, that the plaintiff (Neale), when he entered upon the demised premises, knew that Charlton was in possession of the eight acres under a demise from him (the defendant) for a term then unexpired. This was demurred to, as being inconsistent with the plea: and the court considered the question to be whether the replication was a sufficient answer to the plea. The action was in the Court of Exchequer: and the court, in an elaborate judgment given by Lord Abinger, held that it was not, and supported the plea, and the defendant's right to distrain under the circumstances. The plaintiff brought error, and the judges of the other courts reversed the judgment of the Court of Exchequer—holding that under the circumstances the rent was not apportionable, and that the lessor was not entitled to distrain for the whole or any part of it. But what distinguishes that case from the present is, that there was no allegation of eviction on the record; and the courts held that it was not a case analogous to eviction by title paramount; if it were, they said, the rent would be apportionable, and the action of trespass could not be maintained, for that it is clear a person may distrain for apportionable rent. It was not a case of eviction at all, they said; "for the tenant could not be evicted from what he had never held." But in the case before us the plaintiffs

set up an eviction as having taken place, and they do expressly rely upon that. They have therefore to establish the affirmative of the issue taken upon that point; and it is plain, on the authority of this case of *Neale v. McKenzie*, in error, that they cannot support the position that the mere fact of the lessor having made the previous lease to Parker is equivalent to an eviction. They must shew an eviction in consequence. Dord Denman, in delivering the judgment in *Neale v. McKenzie*, in error, remarks, that in that case the tenant took no interest in the eight acres under the lease, and *had no enjoyment*, and was not bound by any estoppel; and that they were therefore of opinion that the distress made by the defendant was not justifiable, either in respect to the whole rent reserved, or any portion of it. His lordship added, that "they were not aware of any case where an entire rent reserved had been held to be apportionable, in which the tenant had not been at some period subject to the entire rent by virtue of the demise; and in the case before them the right of apportionment was not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself, by which the entire rent was reserved.

Now, in the case which we are considering the tenants had for a time the full enjoyment of all the premises demised to them, and were therefore subject, for a time, beyond doubt, to the entire rent, and bound, as all tenants are, by the estoppel which precludes them, under such circumstances, from questioning the landlord's right to demise. They had also paid the full rent under the lease, as they were bound to do, for the period during which they had occupied. This therefore is a case in which the tenants were under the necessity of shewing that they were not liable at the time of the distress by reason of something that had occurred subsequently: in other words, the alleged eviction was clearly an indispensable part of their case, and they have taken it to be so by joining issue upon the traverse raised upon it. This being so, I am of opinion that the case falls within the principles laid down in *Hodgeskins v. Thornborough*; and to establish the eviction it must be

shewn that the tenants had lost the enjoyment of some portion of the premises which they had once held, or for which they had paid rent, by the subsequent tortuous act of the lessor, or of some person acting under her authority.

The jury, I think, were warranted by the evidence in finding—as they must be supposed to have found, from the manner in which the case was submitted to them—that Parker did not expel the tenants, but acted with their concurrence; in which case the replication was not proved, and the verdict was properly given for the defendants.

My brothers, I believe, do not concur in this view of the case; and I regret that we should happen to differ in opinion, when the subject matter is probably not worth the expense of further litigation: but after maturely considering the case we cannot acquit ourselves of our duty otherwise than by expressing the opinions which we respectively entertain. I will endeavor to make the grounds of my opinion plain by shortly re-stating them. I take it to be clear, on numerous authorities, that in a case like this, eviction requires to be specially pleaded, and that it cannot therefore be given in evidence under the plea of *non tenuerunt*. The plaintiffs have not themselves appeared to imagine that it could, and have therefore pleaded it specially.

That plea to the avowry which sets up an eviction by Mrs. Bostwick was not proved; not directly, certainly, for she did not eject them, or do anything to diminish their enjoyment of the premises, after they had entered and enjoyed as they did for a time, to the full extent of all she had demised to them: nor did she directly expel them; for it is settled, by the case of *Neale v. McKenzie*, that the mere fact of her having made a prior demise to Parker, which included the passage-way, was not equivalent to an expulsion from the passage. It required something to be done in consequence prejudicial to the enjoyment of the tenants, and against their will.

The allegation in the plaintiffs' other plea to the avowry was, that Parker entered under the demise and expelled

and put out the plaintiffs from the passage-way against their will. The question then for the jury was, whether that was proved. They thought that what was done by Parker, so far as regarded the building over this narrow passage-way was not against the will of the tenants; and that it could not be truly said that he expelled them from the passage, in the sense necessary for supporting the plea.

I think that finding was consistent with the evidence, and unless it was clearly against the evidence we should not disturb it; for consider the position of these parties as regards their respective rights, and the hardships that would follow from treating that as an eviction which was done upon an amicable understanding with the tenants. The law is, that when a landlord evicts his tenant, in the legal sense of that term from any part of the premises demised, or where any one else does so by his authority, or under a title derived from him, the rent is suspended as to the whole premises, so long as the eviction continues; he can recover no compensation, even for what the tenant has always enjoyed, till he has restored him fully to the possession of all that had been demised to him; this the law considers to be but a just consequence of the violation of the duty which he owes to his tenant. The principle is a just one, and is fairly applicable to every case in which the tenant's enjoyment has been so interrupted against his will; but it is not applicable when nothing has been done to which the tenant was not freely assenting, and to apply it under such circumstances would be particularly hard here, because the interruption cannot be made to cease by merely withdrawing from occupation and leaving the place—to restore the passage, a house must be pulled down of fifty times the value of the whole part claimed. The question therefore is, in effect, not whether Mrs. Bostwick's rent should not be suspended, till Parker quits possession, when her right to enforce it would undoubtedly revive, but whether she shall lose her rent, for it could never be worth while to pull down the house in order to obtain it. This would be no argument whatever against tenants, if there really has been and is what the law deems an eviction

or expulsion; but it is a strong and conclusive argument against the court or jury taking too rigid a view of the lessor's conduct, by treating that as an eviction or expulsion which, if it was really done with the assent of the tenant, and expressly upon the receipt of an equivalent, was no eviction.

Now, I think the eviction is strong to shew, from the declarations and conduct, and forbearance of the parties, that Parker did not, in the sense which the law attaches to the term, expel the tenants from this passage. It is material to consider that the plea makes no complaint of any interruption except as regards the passage. The disturbing the shingles of the roof, and breaking in upon the gable end of the tenant's house in order to make way for the new building, would have been as much an eviction as the building over this passage; and having made it the subject of a separate action, in which they had recovered damages, it was but reasonable that they should not rest upon it also in this action as a reason for not paying any rent. They probably considered that it would have prejudiced their claim for damages in the other action if they had done so; at all events, no eviction is complained of in the plea now before us, except alleged expulsion from the passage. Now that that was not against the will, and without the assent of the plaintiffs, is strongly shewn by the evidence; and I mean by this, that they did something more than helplessly acquiesce in what they could not resist. Parker having a prior demise, no doubt was in a situation to use the passage as he pleased, whether they were willing or not; and their merely not attempting a resistance against law, and which they could not have succeeded in, if he had fully resolved to assert his right, would have been no assent on their part; that I fully admit; and there are cases which establish that point, in all of which, when their circumstances are considered, it was evidently just and reasonable to hold so. But it is not just or necessary to go so far as to maintain that the tenants could not, under the circumstances, be willing to allow Parker to go on with his building, and could not come to an amicable arrangement with him,

especially for an equivalent; and to make this clearer I put it thus—these things are often arranged by correspondence, and suppose in this case, in answer to a letter from Parker asking the tenants' permission, they had sent him a written answer, to the effect that they knew he could turn them from the passage-way whether they were willing or otherwise, but that they would then be left to seek a remedy from his mother-in-law, Mrs. Bostwick; that they did not wish to be unreasonable, or to embark in a harassing law suit; that the small strip of land in question was of no use to them, but as a passage to the rear of their premises; that they could occupy but a few weeks longer if Mrs. Bostwick chose to put an end to their tenancy—but as Parker, though he might have done so, had not hitherto disturbed them, or any one else, in the possession of the passage, so they did not imagine he would do so now from any vexatious motive, but because he was then anxious to build; and that as it was of much more consequence to Parker not to be delayed for three months in putting up his house, than it was for them to get into their yard by one end of their house rather than by the other, they would be quite willing to offer no opposition, or make any difficulty about the matter, and to let him build upon the passage at once, provided he would let them employ a man to make and cover with plank a passage-way along the west end of the House, and to make a gate from thence into Yonge Street, and would pay the value of it. If the defendants could have shewn that the passage was not occupied till a letter of this description had been written, by the tenants: and if, nevertheless, the court should have held that to be an eviction or expulsion against the will of the tenants—necessarily working a suspension of the whole rent—then I must be wholly in error in the opinion I have formed; but it is clear, I think, that it could not be held to be an eviction, and for that there is abundant authority. Now, if this be so—as there is no necessity that an understanding of that kind must be in writing—the only question can be whether the jury were warranted by the evidence that was given in finding, as they did, that there was no

eviction, for that it was in this spirit the thing was done. Having heard the evidence given, I will only say that such was the impression it made upon my own mind, and that I think it was reasonable that the jury should take that view of it. And it was expressly sworn that the plaintiffs said the new passage to be made at Parker's expense would answer them just as well; that it was made accordingly as they wished, and paid for at their request, on the understanding that they had agreed to give up the use of the other. When asked for their rent in November, the passage-way had been taken possession of for some weeks, but they paid the usual rent without remonstrance and asked for no abatement. Afterwards, when the rent became due in February, which is now in question, they objected to pay it, not because they complained that the passage-way had been taken from them against their will—for it is sworn, and not contradicted, that they made no such complaint—but because, in the meantime, Parker, in carrying up his house, had obstructed the light of one of their windows, and had broken their roof, and otherwise disturbed them as regarded the house they were living in: and they did not wholly object to paying any rent even on that account, but only claimed a deduction.

It was a natural answer to give them that they were seeking damages for that in an action as for a trespass—which action they were still carrying on—and that it was not reasonable to make it also the ground for refusing to pay any rent, even for the period during which they had been unmolested.

Still they persevered in their objection, and why should they make these latter injuries the ground for refusing to pay rent, when they had made no objection in November on account of what had been done in regard to the passage-way? The inference is a reasonable one, I think, that it was because they knew they had assented to the one and had not assented to the other—or at least did not admit that they had.

Then as they would not pay, Mrs. Bostwick distrained, and the plaintiffs treat her in consequence as a trespasser. But on what ground? Not for the only reason which they

gave when that rent was claimed from them—namely, the darkening their windows, and disturbing the roof of the house. They were advised, perhaps, or had considered that that might prejudice their chance of obtaining large damages in the action which they were carrying on for those same alleged injuries. But they change their ground, and give as their reason that they had been expelled from the passage-way against their will—though they had paid a quarter's rent without complaint since that change had taken place, and though they had received compensation. I think they were not at liberty to treat that as unlawful and injurious at one time, which they had agreed to at another time, and throw these consequences on parties when it was too late to retrace their steps. Tenants, I think, are as much bound to act with good faith as landlords. No doubt, whether inadvertently or not, it was wrong in Mrs. Bostwick to lease the plaintiffs a piece of ground of which this small piece had been leased by her before to another, but still there was nothing to prevent any of the parties from coming to a reasonable compromise.

It seemed to me at the trial that as far as the passage-way was concerned, the tenants had given a consent which few people would, under the same circumstances, have refused. And if that was so, as the jury found it was, the legal consequence would be that there was no eviction by Parker in the true meaning of the term.

If there was no expulsion against the will of the plaintiffs it is of no consequence to enquire whether they could or could not have reasonably insisted on any abatement of the rent on account of giving up the passage-way; because if they could, that would only shew that if they had been sued for the whole rent they could have asked the plaintiffs to apportion the rent, and make them some small deduction. No consideration of that kind arises in this action, because the defendants are in this case sued as trespassers for distraining. They were not trespassers if any sum was due for rent, however much less it might be that they distrained for, and there is no doubt that an apportionable rent can be distrained for. In *Neale v. McKenzie*, the Court of Error treat that as unquestionable.

For these reasons, I think the verdict which has been given for the defendants was proper, for I find in no case any intimation of an opinion that under such circumstances the landlord cannot claim his rent as being still due under the original lease, even when it is to be apportioned. I mean, that I find it nowhere said that the first letting is to be considered as put an end to by such an understanding, so as to make it necessary for the landlord to avow as under a new demise: and the authority of Chief Baron Gilbert is clearly to the contrary. I give this opinion with much deference to my learned brothers, who have, I believe, after much consideration, come to a different conclusion, and one that may be found to be more in accordance with authority, though it does not seem to me to be so.

DRAPER J.—According to the case of *Neale v. McKenzie*, the demise of that part of the yard lying south of the plaintiffs' dwelling-house was void in its inception, by reason of Mrs. Bostwick's prior demise to Parker. It is quite clear, and indeed is admitted by the pleadings, that Mrs. Bostwick had demised this portion of the premises to Parker before she made the lease to the plaintiffs, and that Parker's term was unexpired at the time of the distress made, and during all the period for which the rent distrained for was claimed; and that Parker during all that period was in possession of the portion of the premises now in question.

The demise to the plaintiffs was by parol, and according to the avowry, as well as according to the evidence, the rent was reserved out of all the land and premises, both out of the house and the yard into the possession of which Parker entered. The plaintiffs, however, took no interest in that portion of the yard, for it was previously demised by deed to Parker for a term not yet expired; they had no enjoyment during the three months for which the distress was made, and they were not estopped from shewing that they had taken no estate or interest in that particular portion of the premises. They, therefore, it seems to me, were not tenants as set forth in the avowry—*Brown v. Sayce*, 4 Taunt. 320, and *Philpotts v. Dobbinson*, 6 Bing, 104

are authorities to shew that the plea of *non-tenuit* puts in issue the contract stated in the avowry, and that the contract must be truly stated; but it is not true that the plaintiffs were ever under the demise made to them, possessed of any estate or interest in the part of the yard on which Parker built, although they entered into the whole of the premises demised to them, and were, while in possession, liable to the entire rent at which those premises were demised, still in truth nothing passed to them in, but the lease was void as to, the particular part, and they were not, when out of possession, estopped from shewing this.

Supposing then, inasmuch as by reason of possession and enjoyment the plaintiffs had become liable to the payment of the entire rent reserved by the demise, that the rent had become apportionable, if the plaintiffs were evicted; still this avowry is open to this further objection that it claims the *whole* rent as accruing on the original reservation—that is, as arising out of the *whole* of the premises demised, where the plaintiffs would then only be liable for a portion of the rent arising from that portion of the premises of which they retained possession. It seems to me no answer to the objection that the plaintiffs agreed, in consideration of moving the gate and making some other improvements, at the expense of Mrs. Bostwick, to pay for the remainder of the premises the full sum originally reserved as rent for the whole, for this would be a new contract, a new letting and taking—not the contract set forth in the avowry—*Gardiner v. Williamson*, 2 B. & Ad. 336, seems to me to support my view in this respect.

Next, as to the question of eviction, which is traversed by the replication. In *Tomlinson v. Day*, 2 B. & B. 680, the plaintiff had agreed to demise to the defendant a mansion-house and farm, with the exclusive right of sporting over the manor within which the farm lay, and the occupation of the glebe land of the parish. It turned out that the plaintiff had no right to grant the exclusive right of sporting; and he also failed in procuring the glebe land

for the defendant. The court held that "*an eviction* of part of the subject matter of the demise," (namely, of the exclusive privilege of sporting) was clearly proved. In observing on this case, Lord Denman, in *Neale v. McKenzie*, says, "If it was an eviction, it was clearly an eviction by title paramount; the agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person. * * * Supposing the circumstances therefore to amount to an eviction, it would be a case of an apportionment according to the acknowledged rule."

The case of the *Mayor of Poole v. Whitt*, 15 M. & W. 571, seems also to shew that if a party, having a paramount title to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, and attorns to the claimant accordingly, that would be equivalent to an expulsion. The language of the Lord Chief Baron seems hardly to admit of any doubt on this point, though it was not the matter for decision in that case, as the facts did not warrant the application of such a rule. Rolfe, B., expresses his doubt whether the defendant was by his plea bound to prove an entry and eviction by the party on whose alleged title paramount he relied—that must necessarily mean that such party entered and dispossessed the defendant by the forms of law; for he observes, "*the party might yield without that pressure if he chose.*" Now, here the plaintiffs have pleaded and proved a title in Parker to the immediate possession; and, as appears to me, all that the plaintiffs did, in giving up possession to him, amounts only to yielding without the pressure of an ejectment, which they could not have successfully resisted.

In *Smith v. Raleigh*, 3 Camp. 513, which was *assumpsit* for use and occupation, it appeared that the defendant had agreed to take the premises at an entire rent—possession had been delivered to him, after which the plaintiff resumed possession of part of the garden, and the defendant then gave back the keys of the house to him. Lord Ellenborough held that this amounted to an eviction from part of the

demised premises, which, as the taking was single, and the rent entire, he considered a complete answer. In a note this case is said to have been recognized by Dallas, C. J., who laid down the rule, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant by giving up possession of the residue is entirely discharged; but that, if the tenant after the eviction continues in possession of the residue, he may be liable on a *quantum meruit*. When the eviction from part of the demised premises is by title paramount, the rent will be apportioned; were it is by the act of the landlord himself, the entire rent is suspended during the continuance of the eviction (a).

Neale v. McKenzie is a clear authority that this is not an eviction, or analogous to an eviction by the landlord himself, but that the demise of the portion of the premises already leased to Parker was wholly void. The only distinction between that case and the one in judgment is, that there the tenant never obtained possession of the portion of the premises previously leased; here the plaintiffs did enter and enjoy for some time, but they were dispossessed during the whole quarter for which the rent was distrained for. While the enjoyment continued it may be conceded that the plaintiffs were bound to pay rent; but that obligation, I think, ceased with the cessation of the enjoyment, which could not make the lease valid, though it rendered the plaintiffs liable to pay rent while they had uninterrupted enjoyment. In this view of the case, Neale v. McKenzie is in all respects applicable in principle; and Mrs. Bostwick was not consequently entitled to distrain, because in fact the plaintiffs were not her tenants *modo et forma* set forth in the avowry. If the evidence establish here a new taking of the remaining portion of the premises, though at the original rent for the whole, it would sustain an avowry founded on such new taking, but would not sustain the present avowry.

I think therefore the defendants were entitled to a verdict on the issue of *non-tenuerunt*.

(a) *Vide* Morrison v. Chadwick, 7 C. B. 266.

The case of *Hodgskins v. Thornborough* seems to me clearly distinguishable; the demise there was for, and the tenant took an interest in, the whole premises, and disposed of a part of it to a third party. The fact that the original lessor acquired the interest of the third party was held neither to extinguish or apportion the original rent. The first tenant had obtained all the premises out of which the rent issued, and there had been no act of the landlord amounting to eviction, or anything amounting to surrender; the lease operated fully as to the whole premises; here it was void in its inception as to part.

I am of opinion, therefore, there should be a new trial without costs.

BURNS, J.—The difficulty in the defendant's way, it appears to me, in this case, turns upon the construction to be put upon, and the effect to be given to, the issue raised by the pleadings. The avowry of the defendant, as I read the pleadings and the issues raised, must be construed as intended to be for the rent of the premises as originally let by Mrs. Bostwick to the plaintiffs, and not for the premises as restricted under the subsequent and new arrangement. The issue tendered by the pleas and taken thereon is, whether there was an expulsion of the plaintiffs from a part of the premises during the tenancy. Both replications set up by a recital that there was an agreement on the part of the plaintiffs to give up the portion of the premises from which they were ejected; but then the issue tendered is, whether there was an expulsion or not. There is no doubt that the plaintiffs in this case agreed to pay the same rent for the residue of the premises for the quarter of the year for which the distress was made; and so there certainly is no merit whatever in the action, and the question is a purely legal one on these pleadings and the facts. If there had been no demise of the small part which Parker got from the plaintiffs prior to the demise to the plaintiffs, but the plaintiffs had agreed to give up a portion for his convenience, or that of Mrs. Bostwick, and to pay the same rent for the residue, then I should say there was no expulsion. The difference between the present case and that of *Neale*

v. McKenzie is, that in Neale v. McKenzie there never had been any enjoyment by the tenant of the small part, for that had always been in the possession of the person who claimed under the paramount title; and here there was an enjoyment under Mrs. Bostwick until Parker desired to exercise his right for the purpose of building on the lot. As I before remarked, if there was a voluntary surrender by the tenant of part of the premises, he agreeing to hold the residue at the same rent, there would be no legal expulsion; and the only question for the jury would be, whether the tenant did voluntarily give up or surrender the portion; but is that the question in a case where there is a paramount title proceeding from the landlord, and the consent of the tenant is given, as we see it is, because he cannot help himself? I do not mean to say that the plaintiffs here did not freely consent to give up the small piece of ground—no doubt they did so; but then are they precluded by that from saying they were expelled by paramount title? I do not think they are. The legal meaning of an expulsion is not that it requires an ouster or act of force to be done, but it is enough that the quiet enjoyment is invaded or prevented, contrary to the will of the tenant. If a tenant gives up that which he is in no way bound to do, but it proceeds from himself to do it or not, then consent must bind him; but I do not see that such is the fact in law, where the consent is given, no matter how willingly, in a case where the tenant cannot prevent the consequences if he should withhold his consent. In the *Mayor of Poole v. Whitt*, Chief Baron Pollock says—"If a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that, according to good sense, is capable of being well pleaded as an expulsion."

The plaintiffs claim amounts to a case *strictissimi juris*, without merits, upon those pleadings; for the sole issue, irrespective of that of *non tenuit*, is, whether there was a legal expulsion of the plaintiffs from part of the demised premises. My opinion is, that, on the facts proved, it

became a question of law whether there was an expulsion ; and the fact of the tenants having taken possession, and having paid rent, did not prevent them shewing paramount title, whenever that paramount title came to be exercised so as to deprive them of their enjoyment ; and I do not see that their consent to be deprived of that portion from which they might have been ejected estops them, or places the case in a different position from the case where the tenant has not entered, and could not by reason of the paramount title.— *Vide Morrison v. Chadwick*, 7 C. B. 266.

The defendants might have prevented the consequences by avowing in the first instance as upon agreement to pay the same rent for the lesser premises, which would have been a new letting ; or if, as no abuttals or boundaries are set forth in the avowry, the replication had admitted the expulsion of the plaintiffs from the portions set forth in the pleas, but denied that such portion formed any part of the premises avowed for, under which issue it would have been a question whether there was a new letting of the residue at the same rent, and in either of these cases I apprehend the defendants must have succeeded upon the evidence.

I think the plaintiffs have upon this record, and upon the facts, a strict legal right ; and therefore the verdict is contrary to law. The defendants should be allowed to shape their pleadings to meet the case, and I am willing they should have leave to amend.

Rule absolute.

BLAKE V. SHAW.

Yearly hiring—servant leaving without consent.

When a person hired by the year departs without consent before the year is up, he forfeits his wages ; and it is important that this law should be enforced. Where the plaintiff had taken such a course, and afterwards sued for his wages, and a verdict was given in his favor for 25*l.*, the court granted a new trial without costs, though it appeared that the defendant had offered him that sum to settle the suit.

Assumpsit on the common counts. *Pleas*—Non-assumpsit, payment, and set-off.

At the trial, before Sullivan, J., at Niagara, it was proved on behalf of the plaintiff that the defendant was a merchant in St. Catharines, in large business; that the plaintiff was in his service as a clerk, from the 13th of November 1848, till the 30th of September, 1850, and that his service was worth from 75*l.* to 100*l.* a year, besides his board that in September, 1850, the plaintiff went to California and that by his instructions a relative of his afterwards went to the defendant to demand payment of his wages; that the defendant said he would not pay until he saw the plaintiff himself, who would be more in want of his wages when he returned than at that time. This witness swore that she had herself lent the plaintiff 35*l.* when he went away.

On the defence it was sworn by Shaw, the defendant, that he had agreed with the plaintiff about the 15th of November, 1848, to pay him 60*l.* a year; that in September, 1850, he left the defendants service without notice or permission, and sent his sister-in-law to the defendant with an order. The defendant swore that he had paid the plaintiff more than his wages for the first year, and that he told his sister-in-law if he wished to settle he must come himself, for that he did not believe he owed him anything. He swore that the plaintiff agreed with him to serve by the year. The defendant admitted that he offered to give 25*l.* and costs to settle this suit, but not because it was a balance due.

A fellow clerk of the plaintiff swore that he knew nothing of the plaintiff's intention to leave; he went with the permission of the defendant to a fair in the neighborhood, and never returned; the witness recommended him to come back, but the plaintiff said he had got tired of working at 60*l.* a year. This clerk swore that if he were to leave in the same manner, he should expect to lose his wages.

The learned judge ruled that, although it appeared by the evidence that there might be a balance of 45*l.* due to the plaintiff on account of his current year's wages, yet that he was not entitled to sue for it, being hired for a year, and having left without permission before the year had ended.

The jury gave a verdict to the plaintiff for 25*l.*

Mr. Eccles obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was against the judge's charge. He cited Addison on Contracts, 739; Bayley v. Rimmell, 1 M. & W., 506; Farrant v. Olmius, 3 B. & Al. 695; Lilley v. Elwin, 11 Q. B. 772.

Boomer shewed cause, and cited McMillan v. Fairfield, 2 H. C. R. (O.S.) 493.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that upon the evidence the verdict given in this case was against the law, which is clear that where a clerk or other person hired for a year, departs without consent before the year is up, he forfeits his wages, and cannot recover for the part of the year that he has served. And in this case the footing on which the parties were is plain. It was not merely a constructive hiring for a year, but an actual contract of that kind; and courts of justice have expressed themselves strongly on the importance to society of enforcing such engagements, by making parties bear the legal consequences of breaking them. The only room for a doubt whether we may not properly decline to grant a new trial is, that there was certainly no misdirection. The jury were not misled; and it may be said, and perhaps thought, that the verdict is consistent with justice, and ought not therefore to be disturbed. But, as was remarked by the court in the case of Farrant v. Olmius, cited by Mr. Eccles, "If that argument were to prevail, it would encourage juries to commit a breach of duty, by finding verdicts contrary to law, and would enable them to set aside the contracts of mankind."

The jury, we think it probable, awarded the plaintiff 25*l*. in this case, because it was sworn that the defendant, while this action was pending, offered that sum, if the action were dropped, at the same time contending that he was under no obligation to pay anything. The very object of such offer is to stop a law suit, and when the party to whom it is made rejects it, and will persevere in his action, he should derive no advantage from having refused it; but he has thought proper to insist on his supposed legal right, in the hope of

compelling the defendant to pay more, he should be left to abide by the proper legal result of that action.

We are of opinion that there ought to be a new trial without costs.

Rule absolute.

BROWN V. TAGGART.

Set-off--Sum in which parties to an agreement were mutually bound, held a penalty, not liquidated damages--Pleading.

The plaintiff and defendant entered into an agreement by which the defendant was to build for the plaintiff a grist-mill, according to certain specifications, for the sum of 1150*l.*; "and for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of two hundred and fifty pounds, currency, as fixed and settled damages to be paid by the failing party."

Held, that the sum of 250*l.* was a penalty, and not liquidated damages, and that it could not, therefore, be made the subject of set-off.

The defendant, after setting out the agreement, averred that he had built and furnished the mill as he had contracted to do, and that the plaintiff was indebted to him in the price agreed upon to be paid. In reply, the plaintiff merely traversed that the defendant had so built and finished the mill, and on demurrer, the replication was held bad.

Assumpsit on the common counts.

Plea—As to 250*l.*, parcel, &c.: that before the commencement of this suit an agreement under seal was made between the plaintiff and defendant, to the following effect: that the defendant should build a grist-mill for the plaintiff, according to certain plans and conditions set out, to be in working order by a certain day named: that the plaintiff should pay for the same 1150*l.* "as follows, the said money to be paid as the work progresses, the said party of the first part" (the plaintiff) "retaining the sum of 50*l.* cy. out of the value of the work done, as a security of the due performance of this contract; the draining and bailing connected with the foundation to be done at the expense of the party of the first part, and the same to be done by the fifteenth day of April next, if practicable; and for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other in the penal sum of two hundred and fifty pounds currency, as fixed and settled damages to be paid by the failing party;" and the defendant

averred that the said grist-mill could not be erected and finished until after the said draining and bailing connected with the foundation was done: that it was practicable to have done the same by the said fifteenth day of April: that the plaintiff would not do the same, or cause it to be done at his expense by that day, but neglected and refused to do, or cause the same to be done, at any time before the day when the defendant by the said agreement was to have finished the said mill; "*whereby and by force of the said indenture the plaintiff became and was, and is liable to pay to the defendant the said sum of 250*l.* as such fixed and settled damages to be paid by the failing party as aforesaid,*" concluding with an offer in the usual form to set off this sum of 250*l.* against the 250*l.*, parcel, &c.

In another plea as to 500*l.*, parcel, &c., the defendant set out the same agreement, and averred that he had erected and finished the mill in accordance therewith, but that the plaintiff had not paid to him the sum of 1150*l.* agreed to be paid, or any part thereof, but that the same was still due; and that he, the defendant, was ready and willing out of that sum to allow to the plaintiff the full amount of the 500*l.*, parcel, &c.

The plaintiff demurred to the first plea, on the ground that the 250*l.* in the indenture mentioned is not liquidated damages, or a demand that can be made the subject of set-off; and to the second plea he replied that the defendant did not make, erect, and finish the said grist mill, as in the said plea alleged.

The defendant joined in the plaintiff's demurrer to the first plea, and demurred to the replication, as being uncertain, and involving a negative pregnant.

Freeman for the plaintiff.

Martin, for the defendant, cited *Jones v. Jones*, 16 M. & W. 699, in support of the demurrer to the replication. In addition to the authorities referred to in the judgment as to the sufficiency of the plea—*Ainslie v. Chapman*, 5 U. C. R. 313; *Fletcher v. Dyche*, 2 T. R. 33; *Legge v. Harlock*, 13 Jur. 130; *Price v. Green*, 16 M. & W. 346, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

I think that the case of *Galworthy v. Strutt*, 1 Ex. 659, shews plainly the distinction between cases which may be treated as cases of liquidated damages, and those in which the sum named in the agreement as payable in cases of default must be treated as a penalty. On the authority of *Astley v. Weldon*, 2 B. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678; and *Davies v. Penton*, 6 B. & C. 219, we are of opinion we must look upon the 250*l.* mentioned in the agreement set out in the plea as being a penalty, and not liquidated damages, for it is given to secure the performance of several things on each side. If it were regarded as liquidated damages in case of any failure on the defendant's part, it would lead to most unreasonable consequences; for the 250*l.* would have been payable if the defendant had deviated in the most trifling degree from the plan or specifications; and so also on the plaintiff's part, similar injustice would follow. He was to pay for the work as it progressed, and therefore when 20*l.* worth of work was performed, or any smaller sum even, he might be required to pay for it, and in case of failure would be obliged to pay 250*l.* This is, in that respect, a case of securing the payment of a smaller sum of money by naming a greater sum as penalty. Being a penal sum then it cannot be set-off, and our judgment must be for the plaintiff on the demurrer to the plea of set-off; and it is unnecessary to consider whether the meaning of the agreement is, that the plaintiff was to do "the draining and bailing connected with the foundation," or only that it was to be done at his expense—in other words, that he was to pay for it in addition to the 1150*l.*

As to the replication—The parties are in the same position as regards the necessity of shewing specially in what respect the condition precedent has not been performed as if the defendant were suing on this agreement for the 1150*l.*, and the plaintiff were objecting that he had not done what was necessary to entitle him to demand that sum. In that case I conceive that, as in *Glazebrook v. Woodrow*, 8 T. R. 366, the party sued upon the agreement

must point out in what particular the condition precedent had not been performed. Here the defendant claims, in his plea of set-off, the 1150*l.* as due to him under the agreement; and the plaintiff objects that he has not done what was necessary for entitling him to that sum, which is what he specifically claims; and, in order to raise a convenient issue, the plaintiff should shew what failure it is that he complains of, otherwise the parties would go to trial upon all the particulars of the contract, without the defendant knowing in what respect he was charged with having failed.

Judgment for the plaintiff on demurrer to the plea, and for the defendant on demurrer to the replication.

HOWARD V. WILSON.

Dower of wife in lands of her first husband, how released.

A woman under a second coverture cannot, without her husband's concurrence, release her right to dower in lands of her first husband. And *quære*, whether she could release this right by a conveyance in accordance with the statutes for enabling married woman to alienate their real estate.

An action was brought in the names of the husband and wife, for dower claimed by the wife in lands of her first husband. After action brought, the wife executed a release to the defendant of her right, and went before a judge of a County Court, and obtained a certificate of her examination and consent according to the provisions of 50 Geo. III. ch. 10. *Held*, that such release was no bar to the action, being without the consent or concurrence of the husband, and not being a conveyance for any purpose contemplated by the different statutes for barring dower.

Action for dower by Thomas Howard and Susan Howard, his wife, formerly the wife of Robert Wilson, deceased, in land of the said Robert Wilson (*a*).

The defendant pleaded a release by the said Susan Howard, after action brought, and an examination and certificate by the judge of the County Court of the United Counties of Northumberland and Durham.

Demurrer.—Because such release being without the consent or concurrence of the husband of the said Susan Howard, is no bar to this action.

Weller, for the demurrer, cited Roper on Husband and Wife, vol. i. 224.

(*a*) See a former demurrer in this case, vol. ix. 450.

Read, contra, cited *Crabbe*, R. P., § 1155; *Brown v. Meredith*, 2 Keen, 527; *Phillips v. Surridge*, 1 L. M. & P., 467.

ROBINSON, C. J., delivered the judgment of the court.

We see by this plea that the release on which the defendant relies was executed by the widow of Robert Wilson after her marriage with Howard, and during her coverture, and that the certificate of her being examined as to her voluntary consent was given by a judge of a county court. A deed thus executed can only have effect under the provisions of the statute 50 Geo. III., ch. 10, and the question therefore is, whether this is the kind of conveyance to which that statute extends. This is rather a nice question, because, if we should be satisfied that it is not, it may be equally clear to us on examination that this deed does not come within the class of conveyances contemplated by those statutes which enable married women, by going through certain formalities, to convey away real estates of which they are seized; and in that case, this would appear to be an intermediate kind of interest, to which neither class of statutes applied, and which, consequently, a married woman, who by the common law can bind herself by no description of deed, would be incapable of transferring. But the legislature probably did not intend that there should be any description of interest or estate left on that footing. We need not, however, consider the latter question in order to dispose of this case; because it is evident that unless this deed can be upheld as one executed in pursuance of our statute 60 Geo. III. ch. 10, and as properly coming within that statute, the plea must fail. That act was passed for the single purpose of enabling parties to go before a judge of the District Court, or chairman of the Quarter Sessions, for the certificate of examination, which the statute 37 Geo. III. ch. 7 required, and which the last mentioned statute only enabled parties to obtain from a judge of the Queen's Bench, or from the Court of Quarter Sessions. The act is merely auxiliary to the other, and both must be taken to apply to the same description of conveyance. The statute 37 Geo. III. ch. 10, was passed for the more easy barring

of dower; and it enables any person entitled to dower by deed executed alone, or jointly with other persons, to release all her right and title to dower in the lands mentioned in the deed; and such release, it is provided, shall be as effectual to bar the person executing the same of dower in such lands, and every part thereof, as if a fine had been levied by her; and then it requires a certificate of examination of the wife as to her consent, and whether she gave such consent voluntarily, without any coercion on the part of her husband or any other person.

Now, can this statute be properly applied to the case of a woman not at the time married to the husband through whom she claims dower, but whose right to dower has become perfect and absolute by the death of that husband, and whose want of capacity to make a deed arises from her coverture with a second husband? We think not; for the intention of these acts for facilitating the barring of dower was to enable husbands more conveniently to alienate their estates by giving ready means of barring their wife's claim to dower, when she was willing to relinquish it. The object of the certificate was to protect the wife against coercion on the part of her husband, who had an interest in being able to release the estate from the incumbrance, in order to obtain a better price, and a more ready sale for it; and who, therefore, it might be apprehended, might be tempted to use undue means to compel his wife to forgo his claims. But in a case like this, where a wife is entitled to claim an immediate estate in dower out of an estate in which her second husband has otherwise no interest, it is not the wife that wants protection so much as the husband, who is concerned to see that his wife shall not without his concurrence, deprive him of the interest which he would have during coverture in the estate of the wife. It is true that before her dower is measured out to her, the wife has no estate—that is, no legal estate in any particular land; but she has an interest, and so has her husband with her, which can, by a proper remedy in their joint names, be made to acquire the force of an actual legal estate; and there is no reason why the wife, by her sole,

act, without his concurrence or consent, should deprive him of such interest, any more than she should be allowed to execute a deed releasing the obligee in a bond which had been given to her before her second marriage.

All these acts being passed for the one object are to be considered in connection as one law ; and the statute 3 Wm. IV. ch. 9, which extends still further the facilities of obtaining certificates of examination in such cases, by allowing the wife to go before two justices of the peace, shews clearly what the Legislature had in view in all of them, where it recites, "That it is expedient to afford greater facilities to married women to bar their claims to dower of and in any lands which their husbands may be about to depart with."

The conveyance before us was made with no such view, and therefore, in truth, it comes under none of these acts for barring dower. It was not indeed given for barring any uncertain or contingent claim, but for releasing a vested right in which her husband had an interest through her, which was his sole interest in the lands, though there was not then properly an estate either in her husband or in her. It is of no consequence for determining this demurrer to consider whether the wife of Howard could release her dower in her late husband's lands by a deed executed in accordance with the statutes passed for enabling married women to alienate their real estate, or whether a case like the present is one out of these statutes, in which the wife is left subject to the disability which exists at common law. We think the plaintiffs are entitled to judgment on the demurrer, the release pleaded not being effectual to bar the action.

Judgment for plaintiffs on demurrer.

DENAUT V. THE PRINCIPAL OFFICERS OF HER MAJESTY'S ORDNANCE.

Officers of Ordnance, limitation of action against.

Action against the officers of Her Majesty's Ordnance, as incorporated under 7 Vic. ch. 11, are subject to the limitation provided for in 8 Geo. IV. ch. 1.

This was an action brought against the defendants, as incorporated under 7 Vic. ch. 11, for an injury caused by

penning back the water of a stream in the township of Bastard, by means of which the plaintiff was prevented from working his mill, situated on the said stream.

The injury was admitted, and that it was caused by the making of certain repairs and improvements in the works on the Rideau Canal, which were thought necessary to be made by the officer in charge.

The action was brought more than six months after the fact committed, and after the damage alleged had ceased ; and it was objected that this was a bar.

At the trial at Brockville, before Burns, J., a verdict was found for the plaintiff for 25*l.*, subject to the opinion of the court : a nonsuit to be entered if they should consider the action not maintainable.

In Easter term last, *Richards* obtained a rule *nisi* for a nonsuit on the leave reserved ; to which *Hagarty*, Q. C., shewed cause during this term.

The statutes referred to are noticed in the judgment.

BURNS, J., delivered the judgment of the court.

There can be no doubt whatever that the plaintiff's action must fail, and that the rule to enter a nonsuit must be made absolute. The defendants were incorporated by virtue of the statute 7 Vic. ch. 11, and by virtue of that act the Rideau Canal and all the works belonging to it were vested in the defendants. Authority was given by the Rideau Canal Act, 8 Geo. IV. chapter 1, section 1, to the officer employed by his then Majesty to superintend the work to construct, make and do all matters and things which he should think necessary and convenient for the making, preserving, improving, completing, and using the said canal, in pursuance and within the true meaning of the act, doing as little damage as may be in the execution of the several powers to him thereby granted. The 23rd section extended all the powers and authorities given thereby to the officers to be employed by his Majesty in the construction of the canal, or to the officer who might at any time thereafter be in charge, so far as might be required for the purposes of the act, to all and every person employed or to be employed in the execution of any matter authorized to be done by the

act. The 26th section limits any suit that may be brought or commenced for anything done or to be done in pursuance of the act, or in the execution of the powers and authorities given or granted thereby, to be brought or commenced within six calendar months next after the act committed; or in case there shall be a continuation of damages, then within six months next after the doing or committing of such damages shall cease.

It has been urged on behalf of the plaintiff in this case, that the incorporating of the defendants, and, by virtue of the 31st section of 7 Victoria, chapter 11, giving a remedy to individuals to bring suits against the principal officers without distinction, is in effect to do away with the provisions as to limitation of action under 8 Geo. IV. chapter 1; that, in effect, as a right of action was given against the defendants as a corporation, the provisions of the act, which was intended to be a protection to individuals, did not extend to the corporation. This argument is based upon a fallacy in order to make it effective. It would be necessary to prove that the plaintiff, after the passing of the statute 7 Victoria, chapter 11, no longer retained a right to sue the individuals who may have caused him the injury, and that he could only sue the defendants in their corporate capacity. We do not say that the argument would be sound even in such case, but still less is there any force in it, if the plaintiff might in this case have sued the individuals who caused the injury. The effect of the 31st section of 7 Victoria, chapter 11, is not to compel individuals to sue the principal officers as a corporation, but is an enabling clause, directing how and in what manner all suits to be brought against the principal officers may be brought. No doubt such a suit as the present may be brought against them; and the only question when it is brought is, whether the same consequences do not attach as if it were brought against the individuals who caused the injury. We take it to be quite clear that the plaintiff in this case might have brought his action against the individual officer who set the men at work, as well as the men who actually did the work of sending down so much water as caused the plaintiff the

injury. If he might have done this, there can be no room to question that he would have been compelled to have brought his action within six months after the injury; and if the present action can be sustained, it must follow that, as against individuals, there is a limitation to six months; but for the same injury as against the corporation, there is no limitation beyond that in ordinary cases. The object of the 31st section of 7 Victoria, chapter 11, was not to confer a new right, but to give another remedy; and the right to the action was by virtue of the 26th section of 8 George IV. chapter 1, extinguished after the expiration of the period of limitation.

The statute 8 George IV. chapter 1, gave certain powers and authorities to the officer to be employed by his Majesty to construct the canal, and to the officer at any time thereafter in charge thereof. The statute 7 Victoria, chapter 11, transferred the charges thereof to a board of officers, who were thereby incorporated, and against whom it was provided that suits might be instituted. The first section enacts that all the powers and authorities given and granted by 8 George IV. chapter 1, for all and any the purposes therein mentioned, shall be vested in the principal officers. There was no necessity for repeating in this last act the disability created by the former against suits being brought after six months; for the object of the last act was to transfer the powers and authorities from one officer and those employed under him, to a board of officers, and the disability follows the transfer without any new enactment; so in truth it makes no difference against whom the action may be brought the limitation of time equally attaches to it.

For these reasons the plaintiff cannot sustain his action, and a nonsuit must be entered.

Rule absolute.

JAMES McQUEEN V. DANIEL McQUEEN.

Ejectment—Statute of limitations—Evidence.

In an action of ejectment by a son against his father the plaintiff claimed under a deed from the defendant. There was evidence to shew that since this deed the defendant had been more than twenty years in possession, without any recognition of the plaintiff's right. The plaintiff to repel this evidence attempted to shew that during a part of that period the defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in the defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which the defendant claimed to have held adversely. At the foot, but not in the defendant's writing, was written the plaintiff's name and the word "copy." No proof was offered respecting this paper except that it was in the defendant's handwriting.

Held, on motion for a new trial, that such paper should have been received.

Draper, J., dissenting.

Ejectment for the north-east part of Lot 10, 2nd con. of Woodhouse.

At the trial before Draper, J., at Simcoe, the plaintiff proved a deed, dated 9th September, 1816, from the defendant to him for the premises claimed. He also put in an exemplification of the judgment—Doe on the demise of the now plaintiff, against the now defendant—in which the plaintiff recovered against the defendant a term of seven years, commencing on the 1st of July, 1849, in the premises now claimed; he also put in an indenture dated 27th May, 1800, and made between William Francis, of Woodhouse, gentleman, and Alexander McQueen, of Bertie, yeoman, whereby Francis conveyed to Alexander McQueen (among other lands) the premises in dispute, in fee, for the consideration of £250, which deed was registered on the 13th of December, 1800. The defendant then called numerous witnesses to establish that he had been in possession both before and since the deed of the 9th September, 1816, and for more than twenty years after the making that deed, and since this action was brought, both by himself and by his tenants; and in reply the plaintiff called three of his brothers to prove that they (and not the defendant, their father) occupied the land as tenant to the plaintiff, with the defendant's knowledge, during a large portion of the twenty years referred to by the defendant's witnesses;

and he called a son of William Francis, the grantor in the deed of the 27th of May, 1800, who swore that in September, 1836, he heard the defendant say to the plaintiff in relation to the premises—"You have got all the title you can have from me, the Government and Francis"—the witness swearing that he had executed some deed at that time. The plaintiff also tendered in evidence a paper proved to be in the defendant's writing, to the following effect:—"Know all men by these presents, that I, James McQueen, of the township of Southwold, in the county of Middlesex, &c., doth demise, lease, and to farm let, unto Daniel McQueen, Junr." (defendant's son) "all that certain premises belonging to me in Dover, being composed of," &c., (including the premises now sued for) "from the 1st May, 1831, until September, 1834, paying the one-third of all the grain and produce raised on the premises, and one-half of all the hay, delivered to myself; and in so performing the delivery and paying all assessments, the said Daniel, or any person under him may peaceably enter and enjoy the premises during the demise, without the denial, &c., of me the said James, or my heirs, executors, or administrators, or assigns. In witness whereof, I have hereunto set my hand and seal on the day and year first above written; signed and sealed, in the presence of," At the foot was written, but not in the defendant's writing, the name "James McQueen," and the word "copy."

No proof was offered *when* this paper was written, or for what purpose, or that it was a copy of any original, nor in fact any thing more than that it was in the defendant's writing. The judge refused to admit it, and the case went to the jury to determine for the plaintiff or defendant, according to the opinion they formed on the question of possession; and they gave a verdict for the defendant.

In Easter Term *Galt* obtained a rule *nisi* for a new trial on the law and evidence; for the rejection of evidence; and on an affidavit of the plaintiff and two of his brothers, who were witnesses at the trial. Two letters, sworn to be in the defendant's handwriting, were annexed to this affidavit, dated 5th March, 1829, and May 20th, 1831, respectively, addressed to the plaintiff, who swore that he had forgotten

their existence, and only found them after the trial of this cause, when searching among his old papers for other matters connected with this cause. The plaintiff swore that the lease mentioned in the first of these letters, as sent by the defendant to the plaintiff to be executed, was a lease for the premises in question from the plaintiff to one Samuel Ryerse, from 1829 to 1831, who was sworn by Alexander M'Queen to have worked the land under a lease from the plaintiff. The second letter still more plainly referred to the premises in question, both in its terms and in the explanation given in the affidavit of Daniel M'Queen.

Freeman, in this term shewed cause, and argued that the registered paper was inadmissable, on the ground taken at the trial; and as to the affidavit he urged, that if the plaintiff neglected to produce important evidence in his own custody, in a matter which had been litigated, and tried so frequently, for years past, he ought to be left to advance it in a new action.

ROBINSON, C. J.,—The facts of this case have been before us on several occasions, and the judgments of this court given in Hilary Term, 1851, and Hilary Term, 1852 (*a*), will show how impossible we found it to form any confident opinion as to what may have been the true nature of the transaction between Daniel McQueen, the defendant, and his son James McQueen, in 1816, when the deed was made by the former, under which James McQueen now seeks in this action to dispossess him. There are so many suspicious circumstances in the case, that we have been disposed, after former trials of the same title between the parties, to leave undisturbed the verdicts which the juries gave, without attempting to estimate accurately the weight of evidence on either side; for we could feel no assurance that in lending our aid to either party, by an exercise of discretion, in relieving against the verdict of the jury, might we not be defeating rather than promoting the ends of justice.

But of course, whatever impressions we may have upon the merits, if *that term* can be accurately used in this case, it is our duty to take care that no illegal evidence is

(a) Vol. ix., 576.

received, or legal evidence rejected; and in my opinion it would have been proper to allow the draft of a lease sworn to be in the hand writing of Daniel McQueen to go to the jury, to be considered by them as a circumstance, while unexplained, in favor of the conveyance of 1816 from the defendant to James McQueen, under which the latter was endeavoring to make title.

There was evidence, certainly, to the effect that, in the period that has elapsed, Daniel McQueen had been more than twenty years in possession without that kind of recognition of James's title which the statute requires in order to prevent the party dispossessed from being barred. But this evidence was repelled by evidence on the other side, tending to shew that during a great portion of that period the defendant was in possession as agent of his son, and that a brother of James McQueen was during a part of the time occupying as tenant of James McQueen, under a lease made to him by the latter. When the defendant, on his part, wholly denied that such was the nature of the possession which had been held of this property, and asserted that during the whole time he had been occupying as owner, without any recognition of his son (James's) title, or any knowledge of a lease being made by him to the defendant's other son, Daniel, it was surely a material circumstance, to be weighed with the other evidence, that the plaintiff had it in his power to shew a paper in his father's own writing—though not signed by him, and though apparently nothing but a draft of an intended instrument, or a copy of a paper that had been executed—in which paper James professes to lease to his brother Daniel the very land now in dispute from May, 1831, to September, 1834, calling the property "all that certain premises belonging to me (*i. e.* James McQueen) in Dover." Of course it would have been open to the defendant to say whatever he pleased to the jury to lessen the force of this corroborating evidence, by remarks on the want of proof as to when, and on what occasion, or for what purpose any such paper was drawn up, or that it ever was signed: but still the fact

would remain, and would be very proper to be considered by the jury, that, so far from its being altogether an imaginary thing, and unheard of by the defendant, that Daniel was lessee of James of his land at any time after 1816; and so far from the defendant occupying from 1816 downward solely for his own benefit and as owner, he had himself written down on paper a statement of this property as belonging to James in 1831, and had actually written the draft of a lease from him to his brother Daniel of the property.

This might, very possibly, be so explained as to destroy altogether its weight with the jury; but being something done as well as *said* by the defendant himself, quite inconsistent with what he is now advancing, it is undoubtedly legal evidence; and, if not explained away, it is such evidence as might justly be considered both relevant and material. A letter written by the defendant at the same period, to any stranger, in which he had spoken of James's intention to lease this place to his brother, from 1831, to 1834, and without disapprobation, or any denial of his right to lease, would undoubtedly, I think, have been admissible and material evidence: and this paper, being in the defendant's own writing, might as properly have gone to the jury, not as being necessarily conclusive, by any means, but to be considered by them with the other evidence.

I think there should be a new trial, and that the practice in such cases makes it right that it should be without costs. The old letters, now for the first time produced by the plaintiff in moving for this rule, are certainly very material documents, but we could not, on their account, have granted a new trial on any other terms than paying costs, if at all. They have the effect, however, of leaving me less occasion to regret that it seems necessary to set aside the verdict rendered for the defendant, on a legal exception—because, taking those letters into consideration, the evidence does now seem almost irresistible in support of the deed of 1816.

DRAPER, J.—I regret that I have as yet been unable to satisfy myself that this paper should have been received, as I ought not to doubt but that the judgment of the court

in so deciding is right. It has appeared to me rather to be incumbent on the plaintiff, who advanced this paper as evidence, to accompany it with such proof as would connect it with the question the jury were trying, than for the defendant, who could not certainly even know it would be offered, to be prepared to shew circumstances, or suggest explanations which would make it unimportant. The plaintiff could have proved how, and when, and from whom he obtained it, and thereby have done much to clear up the doubt of its admissibility; he, however, merely proved that it was in the defendant's handwriting, and left everything else to inference. If it be evidence at all it must be as an admission, in which case it should either intrinsically be a proof of some fact, or be connected with other facts so as to form a link in a chain of evidence. It does not seem to me to contain intrinsic proof of anything. It may be evidence as a copy of an original, or as an intended draft, or as an instrument prepared for execution—or it may not be any of these; it does not speak for itself and tell us which of them or what it is; no fact connected with it is proved, and as its admissibility appears to be made to depend, or perhaps its value as evidence (more strictly speaking) on the surmise or hypothesis which is adopted as to other unproved fact. What I cannot clearly see my way in is, the propriety of *assuming* any state of facts which is established, would make this paper evidence, and then of deducing from the paper proof of the facts, or some of them, already assumed, or at least proof of conclusions which without the assumption of those facts could not be drawn. It is, in fact, as appears to me, making the meaning of the paper depend on the imagination or preconception of the interpreter. I fear, though I speak with deference to the other members of the court, that is a nearer approach to the doctrine of Algernon Sidney's case, than any lawyer of the present day would willingly give countenance to.

On the affidavits, I entirely concur in granting a new trial.

BURNS, J.—The best opinion I can form upon the question whether the paper purporting to be a copy of a lease

between the parties should have been received in evidence, is that it ought to have been received *quantum valeat*. It is a fact that the paper is in the hand-writing of the defendant. What, then, does this fact establish? It proves that at some time, when does not appear, the defendant either wrote the paper as copying it from another document, or he framed this as an original document. Whether the one or the other, or for what purpose, does not appear. If it is the copy of some other document, or if it be an original document, it being in the hand-writing of the defendant, does it or not import, when read, any presumption of any fact? As between strangers it would import nothing; but I cannot say that, as against the person who wrote it, it may not be capable of importing that the person who purported to be the lessor was capable of sustaining that position as against the defendant, and of so estopping the defendant from disputing title. It seems to me it is capable of being so argued; and if capable of being so put, then, as it is a fact that the paper was in the defendant's hand-writing, the jury had a right to say what the import of it was upon their minds. The fact of its being in the defendant's hand-writing rendered it primary evidence, and there was no necessity, before receiving it, to lay the foundation by a notice to produce the original, or by accounting for its absence. It appears to me it was receivable on the ground of an admission by the defendant either that the paper was a copy of some other document, or that it was an original one of itself—not for the purpose of proving the contents of any other paper, but for the purpose of ascertaining what it imported of itself as against the defendant, when proved to be in his hand-writing. I think the jury was the tribunal to pronounce upon the import, and to say whether the defendant wrote it meaning thereby to admit that the plaintiff had a right to lease the property, or whether he wrote the paper without any such motive, and for some purpose of his own.

There may, or there may not be any value in the fact of the paper being in the defendant's hand writing, for the purpose of deducing another fact, according as different

minds view the question. The paper undoubtedly concerned the matter in issue, and it was an act done by the defendant. If any import can be drawn from it relating to the matter in issue, then with what motive the act was done must be upon the defendant to explain; and the plaintiff is under no necessity to lay the foundation for the reception of the paper. Whether the paper is capable of being treated as susceptible of another fact being deduced, upon the paper being read in connection with the other evidence in the case, was for the jury to say, and for that reason I think they had a right to have it submitted to them.—*Vide* Moseley v. Rede, 10 Jur. 18; Reg v. The Inhabitants of Basingstoke, 14 Jur. 246; 19 L. J. (M. C.) 97.

Rule absolute.

MEYERS V. MAYBEE.

Replevin bond, form of—Plea, "no rent in arrear."

A replevin bond entered into by the principal and *three* sureties is sufficiently in accordance with the directions of 4 William IV. ch. 7; and the assignee of such bond may sue in his own name.

In debt on a replevin bond, the declaration set out that the plaintiff had distrained goods of H. S. N. and J. V. N., which was claimed by the now plaintiff, who replevied. The defendant pleaded "no rent in arrear," which was held clearly bad, as being a defence which should have been pleaded to the avowry in the original action, if at all.

Debt on a replevin bond against A. M., the principal, and *three* sureties, by the assignee of the sheriff, setting out that the plaintiff had distrained goods of H. S. N. and J. V. N., which were claimed by A. M., who replevied. Breach, shewing that judgment in the replevin suit was given for now plaintiff.

Plea, "no rent in arrear," which was demurred to.

Joinder in demurrer, with notice of the following exception to the declaration: that the principal entered into the bond with three sureties instead of two; and that the said bond, therefore, not being in conformity with the statute cannot be assigned so as to enable the assignee to sue thereon in his own name.

Wallbridge, for the demurrer, cited *Austen v. Howard*, 7 Taunt. 28, 327; *Hucker v. Gordon*, 1 Cr. & M. 85.

Bell, contra, cited *Short v. Hubbard*, 2 Bing. 349; *Blackett v. Crissopp*, 1 Ld. Raym. 278.

ROBINSON, C. J.—I think the defendant's exception to the declaration is not entitled to prevail. Our statute 4 W. IV. chapter 7, section 2, enacts that the sheriff "shall take pledges from the plaintiff according to the law of England in that behalf," and that "the bond to be entered into for that purpose *may* be according to the form given in the schedule to this act annexed."

Considering that this is a provision for the protection of landlords, it would be giving it too rigid a construction, I think, to take the words "according to the law of England in that behalf," in any stricter sense than that here, as in England, the sheriff shall take pledges—not that he shall take a bond in the very form and words of bonds prescribed by 11 Geo. II. chap. 19; and it would be still more unreasonable to hold that a bond here shall be void or not assignable, unless taken in those very words, when it has been held in several cases in England that bonds taken not in the exact terms of the statute 11 Geo. II. are not therefore void or incapable of being assigned. And it is material that our statute does not refer us to the English law for the form of the bond, but gives a form, and gives it only as a form that *may* be followed. That form supposes the bond to be given by the person replevying and two sureties. The present is entered into by the claimant and three sureties.

The statute 11 Geo. II. directs that the sheriff "may and shall" take a bond with two sureties. So far as our statute form is a direction, it accords with the English statute; but neither statute provides that a bond taken in any other form, or with more or fewer sureties, shall be void. And it is material to consider that the deviation here is on the right side; the sheriff has done what the statute requires, for he cannot be said not to have taken a bond with two sureties. Looking at the cases that have been decided on this point of replevin bonds varying from the directions of the statute, particularly at *Short v. Hub-*

bard, 2 Bing. 349, and Dunbar v. Dunn, 10 Price, 54, I am of opinion that the declaration may be supported.

Then, as to the plea ; it is one which cannot be set up by the obligors in the replevin bond in this action. The party replevying here is not the landlord, but a third party, who claims to be owner of the goods. When he proceeded in his action of replevin, if there was no rent in arrear to support the distress, and if that would have been an answer in his mouth, to the avowry, he should have made that answer then. The record seems imperfect in not shewing us what issues were joined between the parties. It states the avowry, and then proceeds at once to tell us that judgment was given for the defendant *de rotorno habendo* ; and the defendants (the obligors in the replevin bond), not denying this, plead that there was no rent in arrear, thereby seeking to try over again the merits of the distress, which we must take to have been settled in the action of replevin.

DRAPER, J.—Unless we are to consider (which I do not) the form given to the schedule of our statute 4 William IV. chapter 7, as (taken in connection with the enacting clause which refers to it) making it indispensable that the bond shall be given by three persons—*i. e.*, the plaintiff in replevin and two sureties—we may go on and inquire whether the language of our statute—that the sheriff “shall take pledges from the plaintiff according to the law of England in that behalf”—ties him down to the taking “a bond from the plaintiff and two responsible sureties,” as required by the 11th Geo. II. chapter 19, section 23 ; or whether he may not take pledges generally, as authorized by the statute of Westm. 2, 13 Edward I. ch. 2 ; and if the bond be good under that statute, and consequently under ours, which adopts the law of England generally as to taking pledges, our act gives implied authority to the sheriff to assign any such bond as he may lawfully take under the act. The language of the statute Westm. 2—“that sheriff or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded”—is so far followed by our

enactment that the sheriff shall "take pledges," as to leave such a construction open to the court; and it appears to me to be at the same time a sound and beneficial one.

The plea is clearly bad.

BURNS, J., concurred.

Judgment for plaintiff on demurrer.

SICKLES V. ASSELSTINE ET AL., EXECUTORS OF JOHN SNYDER,
DECEASED.

5 Geo. II., ch. 7—*Lands assets for unliquidated damages.*

Under 5 Geo. II. ch. 7, lands are assets in the hands of executors for the payment of unliquidated damages in an action of covenant, and not merely for debts.

To an action on a covenant for title by the assignee of the bargainee against the executors of the covenantor, the defendant pleaded that they had fully administered all the testator's goods. The plaintiff replied, lands remaining as assets in the hands of the defendants, liable to be seized and sold to satisfy the damages sustained by reason of the breach of covenant declared upon. The defendants rejoined, that they had fully administered all the lands of the testator which had come to their hands, and that they had not at the commencement of this suit or at any time since, any lands, &c., which were of the testator, at the time of his death, in the defendants' hands, as executors, to be administered. The plaintiffs demurred to the rejoinder, which was held clearly bad.

The replication, being excepted to, was upheld on the authority of *Gardiner v. Gardiner*, 2 O. S. 520.

[*Draper, J.*, yielded to the authority of that and other cases decided in this court, and therefore concurred in the judgment, though he considered the replication bad, for the reason given below.]

This was an action on a covenant for title contained in a deed of bargain and sale, brought by the plaintiff, as assignee of the bargainee, of part of the premises, against the executors of the covenantor.

The defendants pleaded in the common form, that they had fully administered all the goods of the testator.

The plaintiff replied, that he is a British subject, and that the testator at the time of his death was seized of lands, &c., in Upper Canada, and that the said lands were at the time of the testator's death, and at the commencement of this suit, and still are, assets in the hands of the defendants as executors, and liable to be seized and sold to satisfy the damages sustained by reason of the breach of covenant in the declaration mentioned.

The defendants rejoined, that they had fully administered

all the lands, &c., of the testator, which had come to their hands, and that they had not, at the commencement of this suit, or at any time since, any lands, &c., which were of the testator at the time of his death in the defendant's hands, as executors, as assets: concluding with verification.

The plaintiff demurred to this rejoinder, and the defendants admitted it to be bad, but they attempted to take exceptions to the plaintiff's replication. They contended that the replication was bad, for that the plaintiff claims by it a right to satisfaction out of the real estate of the testator, not of a debt due to him, but of unliquidated damages for breach of covenant; and secondly, that the replication does not aver that the testator was seized in fee.

Eccles for the plaintiff.

Smith, Q. C., for the defendants.

The authorities cited are noticed in the judgment.

ROBINSON, C. J.—In the latter objection there is clearly nothing, for the replication does aver that the testator died seized of *real estate*, and of lands, &c. The implication from that statement is, that he was seized in fee, when nothing to the contrary appears, and at any rate the use of the words “real estate” leaves no doubt.

The only question is the first one—whether the replication shews a right to proceed, in order to obtain satisfaction from the real estate, under the statute 5 Geo. II. ch. 7, and the effect given to it in Upper Canada by the judges of this court in *Gardiner v. Gardiner* (2 O. S. 520); and *Ruggles v. Beikie* (3 O. S. 347.) The objection taken is, that the British statute only makes lands liable to the payment of debts, not of unliquidated damages to be recovered upon a covenant like that here sued upon. The defendants' counsel relies on the case of *Vankoughnet v. Ross*, in this court (7 U. C. R. 248) in which, following the authority of *Wilson v. Knubley* (7 East 128,) we held that the heir could only be charged by reason of his having assets by descent, in an action of debt for the debt of his ancestor; not in an action of covenant on a covenant for title. The reason of the decision is, that the statute in express terms gives actions of debt only against the heir, and consequently is not applicable except

where debt will lie. The 5 Geo. II. ch. 7, sec. 6, presents no difficulty of that kind. It makes land liable to satisfy "all just debts, dues, or *demands*, of what nature or kind soever," and gives remedy by the same proceedings and process as for obtaining satisfaction from the goods. It cannot be denied that a claim under a covenant is a demand, and though a cavil might be raised on the words "owing by any person," &c., on the ground that "*owing*" refers only to debt, yet, after the effect which we know to have been given by this court to this statute from the very first, we could not now hold that lands are not assets to satisfy judgments for damages recovered upon covenants. The question is not confined to the case of a deceased debtor. The objection would apply in all cases, though in a different shape. It has been always considered that where a plaintiff has judgment in any action to recover damages, or a defendant has judgment for his costs, if there are no goods he may take his execution against lands; for that the verdict and judgment create a debt which the lands are liable to satisfy.

Then, if the plaintiff, when he obtains his judgment, will be entitled to satisfaction from the real estate of his judgment debtor, it would be inconsistent to hold that he can be stopped in his proceeding by shewing that the executor whom he is suing has no goods.

It was well observed by the plaintiff's counsel, besides that the defendants' plea admits the plaintiff's right to judgment, and sets up only the defence that they have no goods from which it could be paid. Indeed, in *Nugent v. Campbell* in this court (3 U. C. R. 310,) this same point is determined. So also in the case which immediately follows it of *Seaton v. Taylor*, executor of Taylor, (3 U. C. R. 303).

In *Gardiner v. Gardiner*, (2 O. S. 520,) the judgment necessarily involved a decision upon the sufficiency of the replication now before us, which was in all respects like the present; and I felt the more bound by the authority of that case, which received the utmost attention from the court, because the particular point of the sufficiency

of the replication was more especially treated by the late Mr. Justice Sherwood, shewing that he had not failed to consider whatever had been suggested on that part of the case.

I refer also to *Ruggles v. Beikie* (3 O. S. 347,) and to *Bowes v. Johnson*, and *Ward v. McCormack*, decided in this court in Trinity term 4 & 5 Vic., and Easter term, 5 Vic.; and there have been, besides these, other cases in which such a replication as the present has been supported, even when demurred to specially, and I can therefore have no doubt that we must hold it to be sufficient upon general demurrer. There is no question presented by this replications which has not been again and again determined by this court, which has always maintained a replication in this form.

DRAPER, J.—The object of the plea of *plene administravit* is to avoid an admission of assets to satisfy the debt claimed. It has no operation to defeat the plaintiff's right to judgment for his demand against the estate of the testator. If the plea be true, it also protects the executor from liability to the plaintiff's costs, *de bonis propriis*.

The replication in the present case is in form a replication in confession and avoidance, for it expressly admits the truth of the matters alleged in the plea—namely, that defendants have fully administered all and singular the goods and chattels. In England the effect of such admission is only to entitle the plaintiff to judge of assets *quando*, which frees the executor from costs.

The plaintiff here, however, after admitting the truth of the plea, affirms as new matter that the plaintiff is a British subject; that the deceased at the time of his death was seised of divers houses, lands, hereditaments, and real estate, in Upper Canada; and that the said houses, &c., at the time of the said death, and at the commencement of this suit, were and still are, in the hands of the defendants as executors, and liable to be seised and sold to satisfy, &c.

In what situation does this replication, if it be good, place the defendants as executors? According to the case of *Petrie v. Fitzroy* (5 T. R. 153,) if they do not rejoin, they are deemed to have abandoned their plea, and the plaintiff may

strike out all the previous pleadings, and sign judgment as for want of a plea; and then, as the record will simply contain a judgment by default, it will be conclusive on the defendants that they have goods and chattels, though the plaintiff has in fact admitted that they have none.

If they confess the replication, then they admit real assets in their hands to be administered, sufficient to satisfy the debt; and if there be any analogy between such an admission of personal assets, they are bound by it, and subject to make good any deficiency *de bonis propriis*.

If they traverse the replication in terms, then the plaintiff proves that the testator died seised of lands, &c. Does that proof entitle him to a verdict against the executors? For if it does, it makes them liable to costs *de bonis propriis*; and such proof must entitle the plaintiff to a verdict on the issues, if it be true, as a proposition of law, that the lands whereof the testator died seised were *assets in the hands of his executors*; and, unless that legal proposition be true, then the replication does not avoid the plea, which is pleaded only to shelter the executors from personal liability. But I do not think that proposition is true as a matter of law, in the only sense in which it can make this new matter replied an avoidance of the defendants' plea.

I take it to be settled law in this province, at least until a contrary determination of a court superior to this is pronounced, that a judgment against an executor or administrator entitled the plaintiff to satisfaction by execution against the lands and tenements of the deceased debtor. But I take it to be at least equally settled, that on the death of a party seised of lands, those lands descend immediately to his heir, or heirs under the recent act, certainly not to his executor or administrator. No administration of the lands is ever granted, nor can it be; nor have I ever heard it pretended that the executor or administrator can sell the lands to satisfy a debt, though they may charge them by suffering judgment to be recovered against them in their representative character.

This replication cannot be a good avoidance of the plea,

unless it be true that the lands are in the hands of the defendants as executors, so that they can satisfy the debt out of them; for if not so, then—whether the defendants suffer judgment by not rejoining, or confess the replication, or traverse it—they will be liable *de bonis propriis*, without the means of resorting to the lands on account of which they have become so liable, which is too unjust a consequence to be possible.

But if the law of descent be as I have stated it, the executor cannot in any way dispose of the land, either to satisfy the creditor or reimburse himself; and then this replication is bad, for it confesses without avoiding the defendants' plea; and shewing only matter which entitles the plaintiff to execution against the estate of the testator, it seeks virtually to make the executor personally liable.

The rejoinder is clearly bad, both on general as well as on special demurrer. The assertion that they have fully administered all the lands, &c., which have come to their hands, is true, though they have administered none, for none did or could come into their hands. But it is untrue that they have administered any lands, for the very same reason; and though the latter part of the rejoinder is true—viz., that at the commencement of this suit, or since, they had no lands, &c., of the deceased in their hands to be administered, yet it is no bar to the plaintiff's having judgment for his debt, and execution against the testator's lands. This latter allegation might possibly be a good answer if the replication could be sustained; but the consequence which seems to me might result from holding it good only the more forcibly shews that the replication is not sustained.

I have stated these reasons why, were the case open, I should hold the replication bad; but so many cases in this court have determined the contrary, that I do not feel at liberty to decide against them, any more than I should on the broader question of the liability of lands of a deceased debtor to execution on a judgment against his executor or administrator, on which point I yield to the authority of decided cases.

Per Cur.—Judgment for the plaintiff.

SICKLES V. SNYDER ET AL.

An action will not lie on a covenant for title against the devisees of the covenantor.

This was an action for breach of the same covenant declared upon in the case last reported, but brought against the heir-at-law and the devisees of the covenantor.

The devisee demurred to the declaration on the ground that the action will not lie against them.

Smith, Q. C., for the demurrer. *Eccles*, contra. *Hunting v. Sheldrake*, 7 M. & W. 256; and *Farley v. Briant*, 5 M. & W. 42, were cited.

ROBINSON, C. J., delivered the judgment of the court.

Admitting that an assignee of part of the estate can sue upon a covenant running with the land, at common law as well as in cases to which the statute 32 H. VIII., ch. 34, applies, which has not been made a question in this case, or in that of *Sickles v. Asselstine et al.*, argued in the same term (a), the point to be considered is, whether an action of covenant lies here against the devisees, or only an action of debt in cases where there is a debt due. It is clear that without the aid of the recent statute passed in England—11 Geo. IV., & 1 Wm. IV., chap. 47—there could have been no action such as this against the devisees; and as those statutes are not in force here, and we have no similar enactments, devisees in this country are no more liable to be sued in covenant than they were in England under the statute 3 W. & M. ch. 14. We are therefore of opinion that the devisees are entitled to judgment on this demurrer, for the cases in England determined before the passing of the statutes which I have referred to are still clear authorities against the action here. I refer to *Twynam v. Pickard*, 2 B. & Al. 105; *Wilson v. Knubley*, 7 East. 128; *Farley v. Briant*, 5 N. & M. 42; *Vankoughnet v. Ross*, 7 U. C. R. 248.

(a) *Ante* page 203.

STINSON V. BRANIGAN.

Bond—Condition—Necessity of request—Prior action in county court—Demurrer.

Debt on bond, conditioned that the defendant should "pay to the plaintiff 43*l.* 15*s.* in building stone at 15*s.* per cord, to be delivered for that sum in the town of Hamilton, *at such times and in such places as* should be required by the plaintiff, twenty cords to be delivered by the 20th of September then next, and the remainder in one year."

The defendant pleaded that from the making of the bond until the expiration of one year, he had always been ready and willing to deliver the said stone at such times and places as should be required by the plaintiff, &c.; yet that the plaintiff did not, within one year from the date of the bond, require him to deliver the said stone or any part thereof.

Held, on demurrer, that the plea offered a good defence.

In a second plea, the defendant averred that the plaintiff had sued him in a county court for the same cause of action as in this suit; and set out the proceedings there, which shewed that a plea in substance the same as that above mentioned was pleaded, and another precisely the same; that the plaintiff replied to the first of these pleas, and demurred to the second; and that the defendant demurred to the plaintiff's replication, and had judgment on both demurrers.

To this plea the plaintiff replied, that the judgment recovered in the county court was upon points of form, and not on the merits, and offered to verify this by the record. The defendant demurred to this replication, and it was held bad; the effect of the judgment against the plaintiff's demurrer being to shew that the plea was a good defence.

The plaintiff sued in debt on bond.

The defendant cravedoyer, and set out the condition, which after reciting that the plaintiff had bound himself to convey to the defendant a certain half lot of land in the township of Garafraxa, was as follows: "Now, in consideration of the said tract of land, I the above bounden Terence Branigan, bind myself and my heirs, &c., to pay to T. S. (the now plaintiff) or his certain attorney, &c., the sum of 43*l.* 15*s.* in building stone, at 15*s.* currency per cord, to be delivered for that sum in the said town of Hamilton, at such times and in such places as shall be required by the said T. S.; it being further understood that not more than one-half of the above stone is to be delivered below the English church; and likewise that twenty cords, part thereof, shall be delivered on or before the 20th day of September, next ensuing; and the remainder with interest thereon, on or before one year from the date of these presents. Now know ye, that if the said T. B., his executors, &c., shall well and truly fulfil all the conditions and covenants hereinbefore mentioned, then this obligation shall be void; otherwise to remain in full force," &c.

The defendant [pleaded, as a second plea, that he was always, since the making of the bond until the expiration of one year from the date thereof—viz., until the 8th of August, 1844—*ready and willing* to pay the said 43l. 15s. in building stone, at 15s. a cord, and to deliver the same in Hamilton aforesaid, at such times and in such places as should be required by the said plaintiff, and hath always, since the making of the said writing obligatory, well and truly observed, performed, and fulfilled all the conditions and covenants in the said condition mentioned, which on the part of the defendant were to be observed, according to the true intent and meaning thereof; yet that the defendant did not, at the time of making of the said writing obligatory, or at any time within the period of one year thereafter, so appointed for the delivery thereof as aforesaid, require the defendant to deliver the said stone or any part thereof, and this the defendant is ready to verify.

The plaintiff demurred to this plea, on the ground that it erroneously assumes that the defendant is wholly discharged from his engagement to deliver the stone, by the circumstance of the plaintiff not having required its delivery at any particular place within the year.

The defendant also pleaded as a third plea, that the plaintiff, before the bringing of this action, sued him in the County Court of Wentworth, &c., in an action of debt, for the same cause of action as is mentioned in the declaration in this cause, which debt arose within the jurisdiction of the said county court. He then set out the declaration in that action in the county court, which was upon the same bond as was sued upon in this action, and shewed that in that suit the defendant, after craving oyer, and setting out the condition, which was in the same words as the condition set out in oyer in this action, pleaded,

First, that he had always, since the making of the said writing obligatory, been ready and willing to pay the said 43l. 15s. in building stone, at the rate of 15s. currency per cord, and to deliver the same at Hamilton at such times and in such places as should be required by the plaintiff; and had always, since the making of the said writing

obligatory, performed all the conditions and covenants in the condition thereof mentioned to be observed on his part; yet that the plaintiff did not, either at the time of the making of the said writing obligatory, or at any time since, require the defendant to deliver the said stone, or any part thereof, at any place in Hamilton aforesaid; concluding with a verification; and that the defendant pleaded in the said county court suit a further plea, which the defendant in this action also set out in his third plea, and which was precisely the same plea as forms the defendant's second plea to the declaration in this action.

The defendant then averred that the plaintiff in the county court suit replied to the first plea of the defendant in that suit, that the defendant had not been always ready and willing to pay the said 43*l.* 15*s.* in stone, at the rate of, &c. and to deliver the same or any part thereof at Hamilton, at such times and in such places as he should be required by the plaintiff to do; but that, on the contrary, the defendant had always refused so to do, when required by the plaintiff, as he in fact had been—to wit, from time to time between the making of the writing obligatory and the commencement of that suit; concluding to the country.

The defendant further set out, that, to his second plea in the county court suit upon this same bond the plaintiff demurred for causes which were set forth—viz., that the defendant by that plea erroneously assumed that he was not bound to deliver the stone unless the plaintiff should within a year require him to do so, and was discharged from liability if no such demand were made; and also, because the plea did not state that defendant at any time offered to pay and delivered the stone, but only that he had been always ready, as if that would discharge him from any offer on his part to deliver, &c.; and because it was incumbent on the defendant, by the condition, to offer to deliver within the year, without waiting for the plaintiff to require him to do so.

And that he, the defendant, in the county court suit, demurred to the plaintiff's replication to the first plea in that suit, as being double, putting in issue the defendant's

readiness to pay when required, and also the fact of the plaintiff having requested delivery; also, because the plaintiff did not in his replication state positively and directly that he did request the defendant to deliver stone; nor any time or place when and where he did so request; also, because the plaintiff's replication should have concluded with a verification, and not to the country.

The defendant then, in this third plea to the present action, proceeded to state that the parties joined in the demurrer in the county court suit: whereupon it was, after deliberation, adjudged by that court that the plaintiff's replication to the defendant's first plea was not sufficient in law, and that the defendant's second plea was sufficient; and that such proceedings were thereupon had, that by the judgment and consideration of the said county court, it was considered that the plaintiff should take nothing by his said writ, but that he should be in mercy, &c.; and that the defendant should have execution for his costs; and that the said judgment is in full force; and this he is ready to verify, &c.

The plaintiff replied to this third plea of the defendant, that the judgment recovered in the said county court was upon demurrer to the pleadings in the said action, upon points of form, and not upon the merits; concluding with an offer to verify this by the record.

And the defendant demurred to this replication, assigning for cause, that if it be true, as the plaintiff alleges, that the judgment for the defendant on demurrer in the suit in the county court was merely on points of form, it follows that the *plea* in the said action is in substance an answer to the action; also, because the replication concludes improperly; that it should have tendered an issue to the country in the ordinary form, and not by the record, as the issues involved matters of fact triable by the jury.

M. Vankoughnet, for the plaintiff, cited 2 Taunt. 325, *note*; Com. Dig. "Condition," G. 6, 12.

Eccles, *contra*, cited Marshall v. Powell, 11 Jur. 61.

ROBINSON, C. J., delivered the judgment of the court.

As to the second plea: the defendant had bound himself, as appears by the condition—which is for the first time set out in the defendant's plea—that he would “pay to the plaintiff 43*l.* 15*s.* in building stone, at 15*s.* per cord, to be delivered for that sum in the town of Hamilton, at such times and in such places as should be required by the plaintiff, twenty cords to be delivered by the 20th of September then next, and the remainder in one year.” Now if the plaintiff had in his declaration set out this condition, and proceeded to claim the penalty of the bond by reason of its non-performance, could he have recovered as for a breach of the condition, without shewing that he had pointed out at what times, and in what places in the town of Hamilton he had required the stone to be delivered? I think it is clear he could not. The defendant had no right to deliver the stone when he pleased, or where he pleased: Such a delivery would not have acquitted him. He was under the necessity of waiting till the plaintiff had given his directions, otherwise the plaintiff might have been put to expense in moving the stone to other places, where he might have preferred receiving it; or might be exposed to the risk of losing, or to expense in taking care of the stone, if delivered before he had occasion for it. The defendant was bound to wait, and therefore safe in waiting for instructions, and if none were given there would be no fault in him. Then, if the plaintiff, in case he had set out the condition, must have averred that he had called for the delivery of the stone at certain times and places, it must be a good defence to plead that he has never done so, since it is traversing a necessary part of the plaintiff's case.

It is objected, that, although the plaintiff may not within the year have pointed out where he wished the stone to be delivered, yet that does not discharge the defendant from his obligation to furnish the stone after the year: in other words, that the plaintiff has not lost his right to sue for his previous debt payable in stone, and that the defendant is not go free.

I think the answer to that is, that the defendant has given

a good answer to the plaintiff's case so far as it has gone; and that, if the plaintiff can shew the bond forfeited by reason of a demand made after the year, and not complied with, which I do not at present concede, it is for him to reply that. The defendant does enough when he shews that he could not comply with the condition which he entered into, because the plaintiff by omitting a necessary act on his part had disabled him from doing so. I do not consider that the defendant was bound to keep himself always in readiness to deliver this large quantity of stone. If it were a perishable article, such as cheese, fruit, &c., it is clear he would not have been; and though stone is not of that fleeting nature, yet it does not follow that a party would be always as well able at one time as another to furnish goods of that description. He might be willing to bind himself to furnish it if called for within a year, but not otherwise. He might be owner or lessee of a quarry, which he intended to part with, or might be obliged to part with. Suppose that, instead of paying the money in this way, the condition was that he should pay it in freight during the year, must he continue to keep a schooner for the rest of his life? I think the excuse of non-performance at least saves the condition. It would be another thing to hold that he can keep the plaintiff's land, without paying for it in money, or in any way. It is not necessary to determine that in this action. In 1 Inst. 207 *a*, Lord Coke says, "If a man make an obligation of 100*l*. with condition for delivery of corn, or timber, &c., or for the performance of an arbitrament, or the doing of any act, &c., this is collateral to the obligation, that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual bar." Now if he was to deliver it at places to be pointed out by the plaintiff, and the plaintiff has done nothing, the effect must be the same as if the defendant had simply bound himself to deliver it at a certain day, and had brought it at the day; for we have no warrant in the case before us for inferring that he was not ready if he had been called upon. I refer to the case of *Holme v. Guppy*, 3 M. & W. 387; to *Wright v. Bull*, 2 Mod. 304; and to Com. Dig. "Condition," L. 4, 5,

6, 7, 8, 9, 10, 11; to *Lawson v. Witherington*, Sir T. Raymond 61; and to *Bac. Abr. "Condition,"* Q. 2, where it is said, "If the condition of an obligation be to pay a small sum, and the obligee refuse it at the day, though this saves the penalty, yet the principal money must be paid; for it still remains a debt," and therefore in such a case it would be necessary to plead that he is yet ready to pay the money, and tender it in court; but not necessary, as I take it, to plead his readiness to do a collateral thing of this kind, and bring into court fifty toises of stone.

There must, we think, be judgment for defendant on the demurrer to the second plea, and also on the demurrer to the plaintiff's replication to the third plea, for it is no answer to that plea that the judgment in the district court was upon demurrer for form, and not upon the merits. It was a demurrer to a replication to a plea which is set out, and which plea we see was a good defence in substance, and not less so because the plaintiff answered it informally, if that were the fact, and on that account had judgment against him. If he could have shewn in that action that the defendant's plea was no defence in substance, he would have been entitled to judgment notwithstanding the insufficiency of his own replication; and he now stands in this situation, that he has already brought in another court of competent jurisdiction, and a court of record, an action on the very cause of action which he is now seeking to recover upon, and has had judgment against him, not by reason of any informality in his declaration, but because a good defence was set up against him, to which he gave no sufficient answer (*a*).

Judgment for defendant on demurrer.

(*a*) *Stark Ev.*, 3rd ed. vol. i. 264.

WORTHINGTON ET AL. V. THE MUNICIPAL COUNCIL OF THE
COUNTY OF HALDIMAND.

Debt—Pleading—Certainty—Agreement—Plea objected to as amounting to the general issue.

Debt for work and labour. The defendants pleaded as to part of the sum demanded, that the work was done and materials provided under a certain contract between the plaintiffs and the defendants, by which it was agreed that in case all the work should not be done on the day appointed in the agreement therefor—to wit, on the 15th of February, 1851—the plaintiffs would permit the defendants to deduct and retain the sum of £6 per week from the money agreed upon to be paid, for every week beyond the time allowed; that the plaintiffs did not complete the work until thirty weeks had elapsed beyond the time appointed, wherefore the defendants became entitled to deduct a sum exceeding that in the introductory part of the plea mentioned.

Held, on demurrer, plea bad, for the *different* reasons given by the court.

Debt. The first count of the declaration set out, that the Provisional Municipal Council of Haldimand. was indebted to the plaintiffs in 1000*l.*, for the price and value of work then done, and materials for the same provided by the plaintiffs, in and about the erection and building of the gaol, court-house, and offices for the said county; and the said Provisional Municipal Council being so indebted, afterwards, and before the commencement of this suit—to wit, on, &c.—the United Counties of Lincoln, Haldimand, and Welland were dissolved by force of the Statute; and thereupon the Municipal Council of Haldimand, according to the form of the statute, became liable to and chargeable with the said debt; whereby and by reason of the non-payment thereof an action hath accrued to the plaintiffs to demand and have of and from the said Municipal Council the said sum of 1000*l.*

The defendants pleaded, as to 105*l.* 9*s.* parcel of the sum of money in the first count mentioned, that the said work and labour was done, and the said materials for the same were provided, under and by virtue of a certain contract and agreement, therefore—to wit, on, &c.—made and entered into between the plaintiffs and the said Provisional Council, whereby it was agreed that in case all the said works were not fully completed and given up on the day and time appointed under and by virtue of the said contract and agreement in that behalf for the same—to wit, on the 15th of February, 1851—the plaintiffs would deduct

and permit the said Provisional Council to retain the sum of 6*l.* per week of the money to become due to the plaintiffs out of the said agreement, for every week during which all the said work might remain uncompleted after the time so appointed for the completion thereof as aforesaid : that the plaintiffs did omit to complete all the said works by the time so appointed, and a long time—to wit, thirty weeks—was occupied by the plaintiffs after that time in completing the work ; whereby the defendants then became and were, under and by virtue of the said agreement, and still are, entitled to deduct and retain from the said price and value of the said work and materials, the sum of 6*l.* per week for every week so occupied as aforesaid after the time so appointed in completing the said work, amounting in the whole to a large sum—to wit, 180*l.*—exceeding the sum of 105*l.* 9*s.* in the introductory part of the plea mentioned ; and that the defendants, being so entitled, did deduct and retain the said sum in the introductory part of this plea mentioned.

The plaintiffs demurred to this plea, assigning for causes that the said plea amounts to the general issue, inasmuch as it alleges that the said work and labour were performed, and materials, provided, under a special agreement, and it is not alleged whether such agreement was under seal or not or that it was in writing ; nor is the time of completing the same distinctly stated, &c.

Cameron, Q. C., for the demurrer, cited *Cleworth v. Pickford*, 7 M. & W. 314 ; *Legge v. Harlock*, 12 Q. B. R. 1015.

Connor, Q. C., contra, cited *Lucus v. Goodwin*, 3 Bing. N. C. 737 ; *Watson v. O'Beirn*, 7 U. C. R. 345 ; *Turner v. Diaper*, 2 M. & Gr. 241 ; *Nash v. Brown*, 6 C. B. 584.

ROBINSON, C. J.—I do not think that it is a good exception to this plea, that it amounts to the general issue, for the plea confesses and avoids the debt declared upon, and only seeks to avoid it in part by claiming the benefit of a set off of liquidated damages stipulated to be paid for delay. The case of *Hayselden v. Staff*, (5 A. & E. 153,) shews, in my opinion, that this is a defence which should be specially

pleaded, for it admits a debt and liability, and in effect claims a set-off, and the debt must be established before it can be seen for what sum the deduction is to be made and it cannot be said that the defendants are in effect wholly denying the debt, when they are only insisting upon an abatement to be made out of it ; they admit the *prima facie* claim, but ask to have part of it struck out, under a collateral stipulation of the plaintiffs, made for the defendants' benefit. It is like the case of a plaintiff suing for hire of a vessel under a charter party, and the defendant claiming to set off a stipulated allowance for demurrage ; it could not be said that that was equivalent to denying the agreement to pay for the hire of the vessel.

As to the plea not stating that the agreement was under seal, or in writing ; the plaintiffs are themselves charging the defendants as their debtors, on account of work done for them. It does not lie in their mouths to say that the defendants could enter into no agreement except under seal ; they treat them as being liable for the debt, and their action depends on that. What the defendants set up is an agreement on the plaintiffs' part to submit to a certain liquidated penalty, in case of delay ; the plaintiffs could stipulate for that without their seal, and without writing, unless the case were brought within the Statute of Frauds, which it does not appear to be ; and so far as regards the necessity for its being shewn that the contract was mutually binding, (which doctrine has been denied in late cases to exist to the extent which has been assumed (a), the plaintiffs have not only themselves treated the defendants as liable for the price of the building, but the defendants have also in the record recognized their own liability.

Then it is objected that it is not stated in the plea that the 6*l.* per week for delay has not been already paid to the defendants, or that the same was due before the commencement of this suit. But there appears to be nothing in these objections, for the plea does expressly state that the defendants are entitled—that is, still entitled—to deduct and retain that amount, and that they do therefore retain it,

(a) Fishmongers' Co. v. Robertson, 5 M. & Gr. 167.

which is their reason for not paying that part of the sum claimed. This surely gives us clearly to understand that the sum thus retained in hand has not been otherwise satisfied. If it has been, the plaintiffs should reply that; and as to its not appearing to be due before this action was brought, the plaintiffs cannot be allowed to say that they are suing for money which is not due; and as the 6*l.* per week for delay is a sum to be deducted from the other, whenever the plaintiffs can demand payment, the defendants must be in time to claim their deduction.

The only doubt I have is, whether it is not a good objection that the plea does not certainly shew when the work was to be finished, which it is necessary should be absolutely and precisely stated, because it is from that day the allowance for delay is to be computed. The defendants say that if the building were not completed on the day appointed by the agreement in that behalf—to wit, on the 15th of February, 1851—there was to be an abatement of 6*l.* a week from the price, and then they aver that the plaintiffs did not complete the work by the time so appointed. I incline to think that the plaintiffs should have stated positively, and not under a *videlicet*, the time for finishing the work, and on the point I refer to *Ekins v. Evans* in this court (2 U. C. R. 144), and the cases there cited. The defendants, I think, do not sufficiently shew that there was any delay, and they are bound to be precise and certain in their statements, because they are in this plea claiming damages by reason of a forfeiture. This cause of demurrer is specially assigned, and I think it is entitled to prevail, and that the plaintiffs must have judgment.

DRAPER, J.—I think the plea bad. I consider that the defence arises on the contract alleged in the plea to be that upon which, as the defendants assert, the work was to be done, which contract as pleaded is different from the contract contained in the declaration. The plea sets forth an express contract containing mutual agreements, which is a different thing from the liability to pay inferred from the work and labour, &c., alleged to have been done. I refer to *Hannuic v. Goldner*, (11 M. & W. 849); and to *Cleworth v. Pickford*, (7 M. & W. 314).

BURNS, J.—There is the form of a plea precisely like the one in this case, in 3 Chitty 805, 6th Ed., and also a plea very similar in Chitty Junior's Precedents. No authority is quoted from which the plea has been extracted, but I find a plea in the case of Fletcher v. Dyche, (2 T. R. 32,) of a similar character—with this distinction, however, that in Fletcher v. Dyche the contract was to *pay* a stipulated sum per week; and in the form given by Mr. Chitty, as in the case before us, the contract is that the stipulated sum for the default shall be deducted from the price or sum to be paid for the whole work. It was held in Fletcher v. Dyche that the stipulated sum was not a penalty in the nature of unliquidated damages; but the question whether the plea amounted to the general issue was not raised, nor can I well see that it could be, on looking at the nature of the contract. In the present case the contract is to allow the weekly sum to be deducted, contemplating therefore that the defendants never could be entitled to be paid anything at the hands of the plaintiff, however long the work was left unfinished.

The case of Cleworth v. Pickford is not altogether satisfactory, because the replication of *de injuria* to the plea, in whatever light the plea was looked at, was bad. That such a demand may be set off under the general issue is proved by the case of LeLoir v. Bristow, (4 Camp. 134); and Baron Parke, speaking of the general issue in an action of this description in the case of Cousens v. Padden, (5 Tyr. 546,) says: "In an action for work and labour, and materials supplied, the defendant may shew the one to be so ill done, and the quality of the other to be so bad, as would not render him liable to pay for them under the contract."

The principle of what Lord Abinger laid down in Cleworth v. Pickford, I take to be this—that in an action of this description, or those similar in nature, whatever the defendant shows to prove that he in truth incurred no liability to pay from the first, amounts to the general issue. Now here, the defendants, *quoad* the sum to the extent of which they say the plaintiff had made default, deny that the plaintiffs ever had any demand upon them. It is not a

confession that he was entitled to so much, and that afterwards there was a right to set off the defaults. The contract for building would not entitle the plaintiffs to demand payment until it had been completed, and that must be at a time subsequent to the time of the weekly defaults which were to be deducted from the amount of the work; consequently, if that be the contract, it follows that the plaintiffs never could demand for the price of so much of their work which would be blotted out or destroyed by their own contract in respect of it. It cannot be necessary for the defendants to plead the written contract, or any special agreement in the nature of the one set out in this plea, merely because the plaintiffs have declared on the common count for work and labour and materials generally, for it is a question of evidence whether the plaintiff is entitled to the word he seeks to recover, or whether, under the circumstances, the defendants are liable either upon an express or implied contract to pay for the same.

As supporting the principle upon which I found my opinion. I cite *Elwell v. The Grand Junction Railway Company*, 5 M. & W. 669; *Francis v. Baker*, 10 A. & E. 642; *Nash v. Breese*, 11 M. & W. 352; *Alexander v. Gardiner*, 1 Scott, 281.

Judgment for plaintiffs on demurrer.

HIGBY ET AL V. CUMMINGS.

Guarantee—Commission—Consideration—Application to add a plea.

Assumpsit on a guarantee. The declaration stated, that, on &c., in consideration that the plaintiffs had paid the defendant, five shillings, and would pay and advance, at the request of the defendant, to S. & J., a sum not exceeding £1250, the defendant then guaranteed, and promised the plaintiffs that S. & J. would ship to the plaintiffs a sufficient quantity of lumber to pay to the plaintiffs the said sum of £1250 by the sale thereof; and that in default of such shipment by the said S. and J. the defendant would repay to the plaintiffs all such sums as they should advance, not exceeding £1250.

The guarantee produced was as follows:—"Whereas H. H. & Co., of Albany, have authorised S. and J. of Houghton, Canada West, to draw on them to the amount of \$5000; and whereas the said S. and J. promise and agree to ship to the said H. & Co. a sufficient quantity of lumber, in the months of May and June, July and August next, to pay the same. Now, therefore, in consideration of one dollar to me in hand paid, I hereby guarantee to Messrs. H. H. & Co., that the lumber shall go forward agreeably to contract, and in default of the same, I will be responsible to them to the amount of the advances, the same not exceeding \$5000."

Held, that the defendant was not entitled to credit as against his guarantee for the gross value of the lumber sent, but that the plaintiffs were entitled to deduct their charges. *Held*, also, that the declaration, as to the statement of the consideration, was sufficiently supported by the proof.

The court, under the circumstances of the case, and facts shewn on the affidavits, refused a new trial, in order to allow the defendant to put in a plea of discharge, on the ground of extension of time given to the principals.

The plaintiffs sued on a guarantee, setting forth in their declaration "that on the 8th of December, 1847, in consideration that the plaintiffs had paid the defendant five shillings, and would pay and advance, at the request of the defendant, to one Frederick Smith, and one Abraham Johnson, a sum not exceeding 1250*l.*, the defendant then guaranteed and promised the plaintiffs that Smith and Johnson would ship to the plaintiffs a sufficient quantity of lumber in the months of May, June, July; and August, then next following, to pay the plaintiffs the said sum of 1250*l.* by the sale of the said lumber by the plaintiffs: and that in default of such shipment by the said Smith and Johnson, the defendant would repay to the plaintiffs all such sums of money as the plaintiffs should advance to Smith and Johnson, not exceeding 1250*l.*: and the plaintiffs averred that confiding in this promise of the defendant, they did afterwards—to wit, on the 1st of July, 1848—advance to Smith & Johnson 1250*l.*, yet that they did not ship any lumber to the plaintiffs to repay to them the said moneys advanced, by the sale thereof, or any part thereof, of all which the defendant afterwards had notice: yet that the defendant, though requested, &c., did not pay the same to the plaintiffs, or any part thereof, &c."

The defendant pleaded 1st, *Non assumpsit*.

2nd, That Smith and Johnson did, during the months of May, &c., in the declaration mentioned, ship to the plaintiffs sufficient lumber to repay them by the sale thereof the said 1250*l.* so advanced by the plaintiffs to the said Smith and Johnson.

3rd, That the plaintiffs did not advance to Smith and Johnson the said 1250*l.* in manner and form, &c.

4th, That the defendant had not at any time notice that Smith and Johnson had not shipped the said lumber to the plaintiffs, or repaid the money so advanced.

5th, Accord and satisfaction, by payment by Smith and Johnson to the plaintiffs, on defendant's account, of divers sums of money, amounting to all the monies in the declaration mentioned, which monies the plaintiffs accepted in full satisfaction and discharge of the causes of action against defendant.

6th, That on the 1st of November, 1851, Smith and Johnson delivered to the plaintiffs, and the plaintiffs accepted from them on account of the defendant, a quantity of lumber,—namely, five millions feet—in full satisfaction and discharge of the defendant's promise, and of all damages by reason of the non-performance thereof.

The plaintiffs joined the issue on the first four pleas, and traversed the accord and satisfaction pleaded in the fifth and sixth pleas.

At the trial, before Sullivan, J., at Niagara, the written guarantee produced was in these words: "Whereas Higby, Hammond & Co., of Albany, have authorized Smith & Johnson, of Houghton, Canada West, to draw on them to the amount of five thousand dollars; and whereas the said Smith & Johnson promise and agree to ship to the said Higby & Co. a sufficient quantity of lumber in the months of May and June, July and August next, to pay the same; now therefore, in consideration of one dollar to me in hand paid, I hereby guarantee to Messrs. Higby, Hammond & Co., that the lumber shall go forward agreeably to contract, and in default of the same I will be responsible to them to the amount of the advances; the same not exceeding five thousand dollars. In witness, &c."

It was proved that, upon furnishing this guarantee to the plaintiffs' agent, Smith & Johnson received a letter of credit from the plaintiffs for \$5000, which was left with the bank through which the draft of Smith & Johnson on the plaintiffs were negotiated. The guarantee was delivered to the plaintiffs before any drafts were negotiated. The five thousand dollars were paid upon five of Smith & Johnson's drafts for one thousand dollars each, all dated 15th December, 1847, which were paid by the plaintiffs in due course.

Messrs. Smith & Johnson did send lumber to the plaintiffs

during the year 1848, which sold for four thousand three hundred and thirty-one dollars, from which amount they deducted a commission of eight per cent., leaving three thousand nine hundred and eighty-five dollars to be credited to Messrs. Smith & Johnson. It was explained that this charge for commission included ground rent for storage of the lumber, dockage, piling, cartage, and for selling: that this was by agreement with Messrs. Smith & Johnson, and that this general charge amounted to less than the aggregate of the charges would have done, if made separately.

The defendant contended that the plaintiffs were bound to credit the whole amount of the sales, without deducting the charges; or rather that the defendant's guarantee would be fulfilled by the transmission of lumber to such a value in gross as would cover the advances, and so that the value of whatever was sent must be deducted in account in full. The learned Judge ruled otherwise.

It was proved also, that in the following year lumber of Messrs. Smith & Johnson was sent to these plaintiffs, to an amount sufficient to make up any balance due on the advances made in 1848 on this defendant's guarantee; but it was clearly proved that such lumber came to the plaintiffs through the hands of third parties, Messrs. Daniels & Co., who shipped it expressly to be applied on account of advances made in 1847 by the plaintiffs to Messrs. Smith & Johnson upon a guarantee given by Messrs. Daniels & Co., and with written instructions to the plaintiffs as consignees to that effect; and of course the plaintiffs were bound so to apply the proceeds, and could not credit the amount against the advances made in the preceding year, and guaranteed by this defendant.

It appeared from letters produced, and other evidence, that these plaintiffs had given an extension of credit, or had used forbearance to Messrs. Smith & Johnson for the balance advanced on the guarantee of this defendant; and it seemed from the evidence, that they had not till lately apprised this defendant of the state of their accounts with Messrs. Smith & Johnson, or made a demand upon him under the guarantee. They seem to have been content to go on trusting to

the integrity and means of Messrs. Smith & Johnson, who, it appeared were not at the time of the trial in good circumstances though they were at the time of this transaction.

The learned judge held that the defendant could not avail himself of any defence of that kind, because there was no plea by him on the record to that effect.

The jury found a verdict for the plaintiffs for 639*l*.

Vankoughnet, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, and for excessive damages, and on affidavits: he cited *Edwards v. Jevons*, 8 C. B. 436; 9 C. B. 154 S. C.; *Price v. Richardson*, 15 M. & W. 539; *Warre v. Calvert*, 7 A. & E. 143.

Cameron, Q. C., contra, cited *Bainbridge v. Wade*, 16 Q. B. 89.

ROBINSON, C. J., delivered the judgment of the court.

We see nothing for which we can properly say this verdict should be set aside. The view taken of the case by the learned judge at the trial seems to us to be correct. All contracts of this description, made in the course of trade, must be construed with reference to what is known to be usual in the description of business. No one sending lumber from this country to a market in the United States could expect to be credited by the consignor with the gross proceeds of such lumber, without deducting the charges attending its reception, safe keeping, and sale. We know that in this description of trade, the charges are unavoidably heavy, the article being bulky and inconvenient to move, and requiring assorting and measurement, room for storage and care to protect it from fire and depredation. All the charges for these and other expenses must of course be defrayed before any one can expect to reap the proceeds of the sale. As to the charges made for commission or otherwise, when they are not settled by agreement, of course they may be resisted if unreasonable in amount, and a jury will allow only what seems just; when the *quantum* of commission has been agreed upon, it may yet, if excessive, be objected to, as furnishing grounds for inferring that the real object is to cover a usurious interest upon the advances made on account of the lumber. We have seen

instances of this in transactions in this country ; and what it may be reasonable and legal to hold in such cases must depend on a consideration of all the circumstances ; we cannot know judicially what contract parties are at liberty to make in this respect in foreign countries.

As regards the technical objections raised to the statement of the consideration, I am of opinion there is nothing wrong in that respect. It was clear on the evidence that it was advances *to be made* which the defendant was undertaking to guarantee—not advances which had been made. The cases of *Goldshede v. Swan*, (1 Ex. 154,) and *Johnson v. Nicolls*, (1 C. B. 251,) are strong authorities to shew that we are to construe the written guarantee with the aid to be derived from a knowledge of the circumstances under which it was given. The declaration in this case states the transaction correctly. The only question is, whether the writing produced contradicts the declaration ; I think it does not, for the authorizing them to draw is quite consistent with an understanding that before the money will be paid they must furnish security. This writing can be applied to a prospective advance upon bills either drawn, or to be drawn with much less difficulty than the guarantee in *Goldshede v. Swan*, was held to apply to an advance not already made. I refer also to *Haigh v. Brooks* (10 A. & E. 319, 334).

As to a new trial on the ground of the alleged delay in calling upon this defendant and the extension of time granted by the plaintiffs to the principals, in order that the defendant may add a plea suited to such a defence—I think we cannot properly grant such an indulgence at this stage under the circumstances. If the defendant has an equitable defence of that kind, he would probably find relief from the concurrent jurisdiction of a Court of Equity in such case. If intended to be used as a defence at law, it should be set up at the proper time ; and if the defendant in this case really did not know, as he swears he did not, of the indulgence which the plaintiffs had granted to Smith & Johnson, till he saw their correspondence on the trial, or upon the very eve of the trial, that would sufficiently account for his not having made use of the defence at law,

and would give him a better claim to relief in equity, if these letters would really constitute ground for relief there. We think we should be going too much against the common practice of courts of law, to allow the defence to be set up now; but whatever we might be disposed to do in such a case, if we had evidence of an agreement to extend the time, such as would be binding on the plaintiffs, and could be for a time a bar to their enforcing their claim against Smith & Johnson, we see nothing more in the letters or affidavit before us than a mere forbearance to act rigidly—no stipulation not to sue or to give time—only an indulgent willingness not to press. The case of *Goring v. Edmonds* (6 Bing. 95), shews that there is nothing proved here which could in law discharge the guarantee.

Rule discharged.

BOWN V. HART.

Action on covenants for title and quiet enjoyment—not maintainable.

In an action on the case the declaration set out that in 1837 one Winniett conveyed a piece of land to E. by bargain and sale, giving absolute covenants for title and quiet enjoyment: that E. entered under this deed and died seised, having made his will in 1840 devising “all his messuages, lands, and real estate” to B., in trust: that B. entered into possession of the land conveyed to E., and in 1843 conveyed it to the plaintiff, by a deed of bargain and sale without covenants: that the plaintiff soon afterwards sold to D. giving a deed with the usual covenant for quiet enjoyment. (The deed from Winniett, and the plaintiff's deed to D. both contained the usual reservation of the rights of the crown, as expressed in the original grant.) The declaration then averred that when Winniette conveyed to E. he was not seized according to his covenant, but that part of the land described was the property of the crown, and was granted in 1846 to one J.; that J. afterwards conveyed to R. who brought ejectment against D., and recovered: that the plaintiff in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges—and these damages he claimed from the defendant in this action as surviving executor of Winniett.

Held, that under the facts alleged the action was not maintainable.

And *quære*, as E. devised to R. only all his real estate, and this land not being owned by him, was not therefore in words devised—whether B. could be treated as holding the covenant of Winniett as assignee, and as a covenant running with the land?

This was a special action on the case, founded on the following alleged facts:—In 1837, Winniett, the defendants testator, sold to Eckerlin an acre of land in the township of York, and conveyed to him by bargain and sale, with absolute covenants for title and for quiet enjoyment, by Eckerlin, his heirs and assigns, in the usual form;

describing the land as containing an acre more or less, and as being part of a lot denominated letter "I," and bounded by Lot street on the north, by the garrison or military reserve on the south, and by lands owned and occupied by Turquand and Fitzgibbon on the east, "which said parcel or tract of land is butted and bounded, or may be otherwise known as follows, that is to say, commencing at the distance of twenty-one chains more or less, on a course south seventy four degrees west, from the north-west angle of Peter street, and on the south side of Lot street; thence south seventy-four degrees west, three chains, seventeen links, along the south side of Lot street; thence south sixteen degrees east three chains, seventeen links, more or less to Simcoe street; thence north seventy-four degrees east three chains, seventeen links, along the northern side of the said street; thence north sixteen degrees west three chains, seventeen links, more or less, along the westerly side of the lot of land now in the possession of Dr. Gwynne, to the place of beginning.

Eckerlin entered under this deed, and died seized, having, while he was so seized, made his will (on the 27th of July, 1840,) whereby he devised *all his messuages, lands and real estate* to Billings, in trust, to sell and apply the proceeds to certain purposes. Billings entered into possession of the land conveyed to Winniett to Eckerlin, and became seized, and on the 19th of July, 1843, sold to this plaintiff, Bown, and conveyed to him by bargain and sale, containing no covenants, as it appeared, the same land (as the declaration averred) which was conveyed by Winniett's deed to Eckerlin—describing it as *all that parcel of land in the city of Toronto*, in the county of York, in the province of Canada, containing one acre, more or less, being composed of lot lettered "I" in the township of York, now forming part of the city of Toronto, and bounded by Lot street on the north, by the garrison or military reserve on the south, and by lands owned by William Botsford Jarvis, Esquire, on the east. Then metes and bounds were stated the same as in Winniett's deed to Eckerlin, except that in this deed the third boundary is carried to "the western limit of land then owned by William Botsford Jarvis."

Bown entered and became seized, and, on the 13th of November, 1843, sold to Dick, and conveyed to him, by bargain and sale, the same land (as the declaration averred) which is mentioned in both the above indentures; and covenanted by this deed, with Dick, his heirs and assigns, that Dick, his heirs, &c., should quietly enjoy, without the interruption, &c., of him (the said Bown) or of any other person whatsoever. The deed from Winniett, and from Bown to Dick, both granted the land with the usual reservation, "subject to the reservations, limitations, and conditions expressed in the original grant from the crown."

The declaration averred, that when Winniett made his deed to Eckerlin he was not seized, according to his covenant of all the land which he pretended to convey, and that Dick, so being assignee, did not and could not peaceably and quietly enter into and enjoy the same, without the hindrance of any person whomsoever, according to Winniett's covenant; but that part of the land described in Winniett's deed—to wit, half an acre—was the property of the crown; that the Queen, by letters patent, granted the same to Robert S. Jameson, Esquire, on the 6th of July, 1846; that Jameson afterwards conveyed the same to Rees, who brought an ejectment to dispossess Dick, and obtained a verdict; that Dick, threatened to bring an action against this plaintiff (Bown) on his covenant; and that Bown, in order to prevent Dick being dispossessed, paid Rees the costs of the ejectment, and 600*l.* as the value of the land, and paid other sums for costs and charges, to which he (the plaintiff) was put, in consequence of the covenant for quiet enjoyment which he had given to Dick. And the plaintiff concluded his declaration by stating, that he had sustained damage to the amount of one thousand pounds, which he claims in this action from Hart (the defendant), as the surviving executor of Winniett. The declaration contained two counts, the last only varying from the first in omitting an averment contained in the first—that the want of title in Winniett was not occasioned by any reservation or condition in the original grant of the said land from the Crown.

The defendant demurred specially to this declaration.

Gwynne, Q. C., for the demurrer, cited *Gamble et al. v. Rees*, 6 U. C. R. 396; *Scott v. Fralick*, *Ib.* 511; Co. Litt. 385; 1 Saund. 241, note *a*; *Taylor v. Shum*, 1 B. & P. 21; *Browning v. Wright* 2 B. & P. 22; Cro. Eliz. 517, 518; *Wolveridge v. Stewart*, 3 Tyr. 637; *Campbell v. Lewis*, 3 B. & Al. 392; *Ashford v. Hack*, 6 U. C. R. 541; *Fraser v. Skey*, 2 Chy. Rep. 646; 1 Roll. Abr. 521, K. 6; *Harley v. King*, 5 Tyr. 692.

Cameron, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

If, under such circumstances as are stated, an action of this description would lie, then I do not see any particular reason why this declaration should not be held sufficient. If Winniett had no title, his covenant would be as clearly broken by the estate being at the time in the Crown as in any other party. The defendant's counsel rested his argument in support of several of his objections on the assumption that the covenants in the deed by Winniett were restricted; but this seems to be a mistake. The covenant of seizin and for quiet enjoyment by Winniett, and the covenant for quiet enjoyment by Bown, are as absolute and unqualified as any can be. The words in the *habendum* in Winniett's deed, "subject to the reservations, &c., in the original grant from the crown," cannot be held to have the effect of confining his covenant for title, or for quiet enjoyment, to such lands as had been granted by the crown, and so excluding their application to the half-acre in question, which had not then been granted by the crown—for this reason, among others, that the crown, for all that appears, had granted the other portion of the land; and if so, then this saving, which it is usual to insert, would properly apply to such part, whether the whole acre had or had not been granted by the crown. Then, although it is true, as has been objected, that the lands are differently described in the different deeds, yet the declaration does, in each case, aver the tracts to be the same—as they might well be, the apparent variance being only occasioned by this part of the township of York forming now a part of the city of Toronto, and by certain land, by which this acre was bounded, having

changed its occupant since Winniett described it as being in the possession of Messrs. Turquand and Fitzgibbon. It appeared in the argument, and we have had occasion to learn the fact otherwise, that the want of title in Winniett to the whole acre which he conveyed, arises from some misapprehension on his part, or those from whom he received his title, as to the limits of the military reserve; and at first sight it might appear that, as Winniett only professes by his deed to grant a tract bounded on the south by the military reserve, he could be in no danger of having broken his covenant, though it should appear that the reserve came nearer to Queen Street than it was supposed to do. The question would be, whether he assures by his deed the tract as described by metes and bounds, or only the tract, whatever it might be, which lay between Queen Street, the military reserve, and Turquand and Fitzgibbon's land on the east—in other words, what is the ruling feature in the description? The declaration, however, does not disclose to us what portion of the tract it is to which Winniett's title was defective, or that the deficiency arose from the cause I have mentioned, and therefore it seems to me the plaintiff's case would be subject to no such difficulty as I have suggested.

In considering the plaintiff's right to this action, we must suppose, I think, that he grounds his claim to this remedy, by a special action on the case against Winniett's executor, on the fact that he, the plaintiff, once held, as assignee, a covenant from Winniett which ran with the land, but that he is unable to avail himself of it because he had parted with the estate, and therefore no longer holds the covenant or any right to sue upon it, and would be without remedy for the injury which had fallen upon him in consequence of Winniett's want of title, unless he can obtain it in this form. Bown would not, I suppose, contend that he can have a right to maintain this action, unless he would have had a right of action as assignee upon the covenant, in case he had never sold to Dick, and if Rees had ejected him. Then is this so? Eckerlin did not, by his will, so far as appears, assume so devise this acre of

land, or make any mention of it. He devised only all his land and real estate to his trustee Billings. If it be true that the half-acre, which the crown afterwards granted to Jameson, formed no part of Eckerlin's real estate, then it not only did not pass by his will, but he did not attempt to claim it—and Billings, in afterwards conveying to Bown, conveyed to him lands which had not been assigned to himself: not merely lands which did not pass, as in the case of *Gamble v Rees* cited in the argument, but lands which Eckerlin did not in words devise to him. And whether, under such circumstances, Bown could be treated as holding the covenant of Winniett, as assignee, and as a covenant running with the land, is a point which I am not prepared to determine in the affirmative—but I am clearly of opinion, on other and broader grounds, that this is an action that cannot be sustained.

It is attempted to be supported as a case similar in principle to that of *Burnett, et al., executors of Burnett v. Lynch*. (5 B. & C. 589). There Burnett, the testator, had taken a lease from Myrick of certain premises, and had covenanted to paint the house and iron railings once in five years, and to repair the whole during the term, of which stipulations Lynch had notice: and afterwards he assigned all the premises to Lynch for the remainder of the term, subject to the performance of all these covenants by Burnett contained in the lease. The defendant entered, but did not paint the house, nor make the necessary repairs while he occupied, and in consequence Meyrick brought an action against the executors of Burnett, he having died in the meantime, and they recovered a large amount of damages, which the executors had to pay. The plaintiffs (the executors of Burnett) then brought a special action on the case against Lynch, for a breach of his duty in not performing, as he undertook to do, the covenants which Burnett had given to Meyrick—by which breach of his duty Burnett, or his estate, had sustained this injury. The defendant pleaded the general issue only, and the plaintiffs received a verdict. The defendant moved in arrest of judgment on the ground that an action on the case could not, under such circumstances, be sus-

tained ; and he contended there could be no remedy by the lessee against the assignee, after the interest of the assignee had ceased—there being no contract between them that the latter should indemnify the lessee against any breaches of covenant ; and that, if, from this defendant having accepted the premises subject to the performance of the covenants, the law would imply a covenant or promise to indemnify, then the action should have been in covenant or assumpsit.

The court treated the action as one of the first impression ; they held that an action of covenant could not have been brought, for that there was no covenant by Lynch ; that an action was upon an implied assumpsit might probably have been sustained, but that if it could have been, that would be no reason why the plaintiffs might not also sue in case, as for a breach of the duty to which the defendant had bound himself by the assumpsit : and upon general principal of law, they considered that the action on the case could well be sustained, brought, as it was, for an alleged wrong, in disregarding the duty which Lynch owed to Burnett under the circumstances—from which breach of duty a particular and great injury had been suffered by the plaintiffs as his executors. The reasons given by the judges are fully reported. The decision is certainly in accordance with justice, and seems to proceed upon principles applicable to the facts of the case. We gladly availed ourselves of the authority of that decision in the case in this court of *Ashford v. Hack* (6 U. C. R. 541), of which the facts were very similar : but it does not appear to me that the case of *Burnett v. Lynch* goes, by any means, the length of supporting this action. That was itself a new application of certain legal principles, which, though well established, it did not appear had ever before been so applied. Mr. Justice Littledale, in his judgment, observed that he had considerable doubt for some time whether the action was maintainable, and that there was no instance of any such action in any of the books.

While therefore, we willingly yield to the authority of this judgment in all cases that are clearly analogous, we

must be careful not to go unwarrantably beyond it, and apply it to cases which are not within the same principles.

Now, in *Burnett v. Lynch* the court grounded their decision on the fact that Lynch, while he was in occupation of the estate, under a tenure derived from Burnett, had violated a duty to Burnett which resulted from the conditions of his occupation; and that, from this breach of duty, Burnett's estate had received a special injury. The declaration was suited to such a complaint. It was plainly a declaration in an action for a tort. It alleged that it became the duty of Lynch, as assignee, under the circumstances stated, to perform all the covenants while he remained in possession as such assignee; but not regarding his duty, but contriving to injure the plaintiffs, he did not, nor would, make the necessary repairs: by reason whereof the plaintiffs, as executors, were forced to pay, &c.

Now, the declaration in this action before us is not in *assumpsit*, but is a special action on the case, neither grounded on any promise from Winniett or the executors, nor yet founded on any alleged tort. No duty is stated, no breach of duty alleged, no wrongful act. If, either directly or by construction, the defendant or Winniett could be charged with being guilty of a wrong, still they are not so charged.

But in my opinion the objection lies deeper, for the facts, I think, would not have warranted any action as for an alleged breach of duty by Winniett towards Bown, or towards any one. If this action could be supported, then it must follow, that, in every case where a bargainee takes a deed with or without covenants, if he is disturbed he could bring his action against the bargainor, as for an alleged breach of duty in conveying land which he did not own, and this whether the bargainor did or did not know of the defect in his title.

No authority has been cited, nor I think can be, for such a position; and, indeed, if the law were such, there would be little value in the distinction between qualified and unqualified covenants. Nothing is alleged, in this case, to have been done or omitted by Winniett after he gave his

covenant ; but it is assumed that, having given a covenant for quiet enjoyment, in 1837, to Eckerlin and his assigns, he was not merely liable, under that covenant, to all actions that would lie upon it by parties holding his covenant, but that he must owe a duty for ever after to indemnify any, though they may not be the holders of his covenant, who have suffered in consequence of Eckerlin or his assignees being molested.

Burnett v. Lynch does not go that length ; and if it did, it would then only be authority for determining that the plaintiff might have declared in an action of tort against the defendant as for the wilful neglect or breach of an alleged duty ; but this the plaintiff, in the present case, has not done : he has brought an action not grounded on any privity of contract between him and the defendant, nor for any tort founded on an alleged duty. If, under the circumstances of this case, a duty was incumbent on the defendant to indemnify the plaintiff for what he had been compelled to pay to Dick—which I do not by any means affirm—such duty should have been averred, and that the defendant had been requested to do so, and had refused or neglected, and so had wrongfully committed a breach of duty. That would have been, in form at least, an action of tort. This is neither an action of tort (wanting all the language peculiar to such actions), nor is it an action grounded on any contract with the plaintiff.

Per Cur.—Judgment for defendant on demurrer.

DOE DEM. KINGSTON BUILDING SOCIETY V. RAINSFORD.

Lease—Assignment—Registry—9 Vic. ch. 34.

A. leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term, unless he should choose to pay for the improvements—this lease was registered. The lessees then assigned part of the premises, and the assignee did not register. C. devised his interest to B., who subsequently mortgaged the whole premises to the plaintiffs—this mortgage was registered.

Held, that the covenant for renewal did not extend the term so as to bring the lease within 9 Vic. ch. 34 ; that the unnecessary registration of it did not make it requisite to register the assignment, and therefore that the mortgage to the plaintiffs could not affect the premises assigned.

Ejectment for part of lot letter E. in the city of Kingston.

At the trial before Burns, J., at Kingston the facts appeared to be these:—On the 23rd of May, 1842, John Mason, being seized in fee of the premises in question, with others, executed a lease for more than was claimed in this action to John Rainsford and Benjamin Rainsford, for a period of fourteen years. The lease contained a clause and covenant in these words—“And the said John Mason, for himself, his heirs and assigns, doth hereby further covenant, promise and agree, to and with the said John Rainsford and Benjamin Rainsford, their and each of their executors, administrators and assigns, and every of them, that they, the said John Rainsford and Benjamin Rainsford, their or either of their executors, administrators, or assigns, paying the yearly rent hereby reserved, and observing, and keeping, and performing all land singular the covenants, clauses, articles, and agreements herein contained, on their part and behalf to be observed, fulfilled, and kept, he, the said John Mason, his heirs and assigns, shall and will, on or before the expiration of the term hereby granted, well and truly pay or cause to be paid unto the said John Rainsford and Benjamin Rainsford, their executors, administrators, or assigns, so much money for all such buildings and improvements then standing and being on the premises hereby demised, as the said buildings and improvements shall then be valued at by a competent architect or builder, to be chosen by the said parties hereto, their heirs, executors, administrators, or assigns, to value the same; and that, provided the said John Mason, his heirs or assigns, shall not be willing, or shall neglect, or refuse to pay for the said buildings and improvements on the said premises, at the time and according to the valuation as hereinbefore mentioned, the said John Mason, his heirs or assigns, shall and will at the expiration of the present lease, at the request of the said John Rainsford and Benjamin Rainsford, their executors, administrators, and assigns, grant and execute unto them a new and fresh lease of the land and premises hereby demised, with the appurtenances thereof, for the further term of fourteen years, to commence from the expiration of the term hereby granted, at the same yearly rent, and sub-

ject to the like covenants, promises, and agreements, as are contained in these presents—the said John Rainsford and Benjamin Rainsford, their executors, administrators, or assigns, executing a counterpart thereof; and at the like request of the said John Rainsford and Benjamin Rainsford, their executors, administrators, or assigns, shall and will, at the expiration of such further term, grant a further lease for a third term of fourteen years, to commence from the expiration of the second term or renewed lease of the same premises, at and under the same yearly rent, and subject to the like covenants, provisoes, and agreements as are contained in these presents—the said John Rainsford and Benjamin Rainsford, their executors, administrators, or assigns, executing a counterpart thereof; or shall and will, otherwise, at the option of him, the said John Mason, his heirs, executors, administrators, or assigns, pay, or cause to be paid unto the said John Rainsford and Benjamin Rainsford, their executors, administrators, or assigns, at the expiration of the said second term, so much money for the buildings and improvements then standing and being on the said premises hereby demised, as the same shall then be valued at by a competent architect or builder, to be chosen in the manner hereinbefore mentioned.”

This lease was registered on the 6th of June, 1842. The lessees built three houses on the premises, their mother Margaret Rainsford, having lent them 200*l.* to assist in building. Margaret Rainsford, the mother, and the two sons, lived together in the house and premises, the subject of this action, until the death of John Rainsford in 1844. On the 20th of June, 1843, John Rainsford and Benjamin Rainsford, by deed, assigned to their mother Margaret, the house and premises claimed in the present action, and also assigned to her the benefit and advantage of a renewal of the lease, and of the value of the buildings and improvements in case Mason should pay for the same. This assignment was never registered. John Rainsford made his will dated the 4th of March, 1844, and devised his interest in the premises to his brother Benjamin, and shortly after died. Benjamin Rainsford still continued to

live with his mother until he married, and then he moved into one of the other two houses. Margaret Rainsford died in possession of the house and premises so assigned to her in 1845, having lived there always "as if it were her own," as the witness expressed himself; and she made her will, dated 29th August, 1845, and thereby devised the premises in question to her daughter Mary Rainsford, the defendant in this action. Benjamin Rainsford was a subscribing witness to this will. Mary Rainsford remained in possession, living in the house ever since her mother's death. On the 4th of May, 1848, Benjamin Rainsford executed a mortgage of the whole premises leased by Mason, and including the premises assigned to his mother, to the Kingston Building Society (the lessors of the plaintiff), which was registered on the 5th of May, 1848. He afterwards executed to the same parties two other mortgages by way of further charge on the premises—the first on the 9th September, 1848, and the second on the 16th of December, 1848, which were registered on the 13th of September, 1848, and the 5th of January, 1849, respectively. Benjamin Rainsford having made default in payments to the Building Society, the present action was brought.

At the trial two objections were raised by the plaintiffs against any title being established in the defendant.

1st. That the defendant claimed under an assignment by the two Rainsfords to her mother, which is not within the meaning of the exception to registry, enacted by the 11th sec. of 35 Geo. III. ch. 5, and to be within that exception, it should have been a lease from them to the mother; and therefore the original lease to the Rainsfords being registered, and the mortgage to the lessors of the plaintiff being also registered, cut out the unregistered assignment to the mother.

2nd. Supposing that the mother could be said to be lessee of the premises, yet it was necessary, the term being for less than twenty-one years, that possession should accompany the title. It was contended that here there was no possession in the mother, and the words in the assignment were relied upon to establish this. The words

were these—"Which said house is, at the date hereof, occupied by the said John Rainsford and Benjamin Rainsford."

The learned judge held that the evidence sufficiently explained the kind of occupation meant by the Rainsfords, and that the mother had as much an occupation of the house and premises as the head of a family usually has; and though the sons may have been said to be in the exclusive occupation up to the time of executing the assignment, yet, after the execution of that instrument the mother's occupation of the premises would refer to her existing title, and the evidence shewed it was so. A verdict was directed to be entered for the defendant, subject to the opinion of the court whether the plaintiff could recover; and if the court should be of opinion that the plaintiff ought to recover, then a verdict should be entered for the plaintiff.

In Easter Term, *Smith*, Q. C., obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff, pursuant to the leave reserved.

In this term *Kirkpatrick*, Q. C., shewed cause.

Vankoughnet, Q. C., supported the rule, and urged, beyond the points raised at *Nisi Prius*, that by reason of the covenant of *Mason* for renewal of the lease, a greater interest was created in the *Rainsford* than for twenty-one years, and therefore the assignment by them to *Margaret Rainsford* required to be registered. On this point he cited *Goodright ex. dem. Hall v. Richardson* (3 T. R. 462.)

BURNS, J., delivered the judgment of the court.

If it were properly open to the plaintiff to raise an objection to the defendant's title upon the argument which was not raised at *Nisi Prius*, or relied upon them, still the objection, now made for the first time, is not a valid one. The provision respecting registration is that all deeds and conveyances which shall be made and executed of or concerning, and whereby any lands, tenements, or hereditaments, may be anywise affected in law or equity, may, at the election of the party concerned, be registered, provided that the deeds or conveyances do not extend to include any leases at a rack rent, or to any

lease not exceeding twenty-one years, where the actual possession and occupation goeth along with the lease. The Rainsfords registered the lease from Mason, it is true ; but the question is, whether that were necessary, and whether the lease for that purpose can be said to effect in law or equity the premises demised for a longer period than twenty-one years. It is quite clear that no present term was created beyond fourteen years by the lease, and that, if a second term of fourteen years was to exist, it must be by a new instrument to be executed between the parties ; and if Mason did neglect to pay for the buildings at the expiration of the first term of fourteen years, the lessees could not, after the expiration of the first fourteen years, have held the premises under the existing deed—for the provisions respecting the second term amount only to a covenant, and not to a subsisting lease.—*Evans v. Thomas*, (Cro. Jac. 172.) Without a new lease for the second term of fourteen years, the parties claiming the estate under the present instrument would have no legal title ; and without such new lease, the premises would not be affected in law in anywise. Whether it be possible to construe this instrument so as to hold that the land is affected in equity by reason of the covenants *presently* in the instrument contained upon the execution of it, or whether the land is to be considered as affected only by a contingent event independent of the deed, it is of no importance now to consider. What the legislature meant in the eleventh section of the act, clearly, was a legal term less than twenty-one years ; and here in this lease is no legal term beyond fourteen years—and therefore there was no necessity to register the lease in order that the term might legally subsist against every one claiming under a registered deed. When the sons executed an assignment of the lease to the mother, she was in possession and occupation—not by virtue of the assignment to her, but by virtue of the original lease for the remainder of the term : and if they were not bound to register the original lease because the term created came within the exception of the statute, neither was she bound to register the assignment. She was

not bound to register the assignment simply because they thought proper to register the lease.

The case is simple enough, after all, and creates no difficulty. A legal term is created by deed for fourteen years, and no more, which required no registry. The parties do register it, however, and then assign part of the premises to another person, who goes into possession, claiming the residue of the term in that part of the premises. Subsequently the assignor mortgages the whole premises, including that part assigned, and the mortgagee registers, and under the mortgage deed claims the residue of the term of fourteen years from the first assignee, on the ground that, because the assignor had registered his lease, the assignee was bound also to register the assignment. That, we think, is not the law. The plaintiffs must have known when the mortgage was taken, the extent of the legal interest of Benjamin Rainsford, for the *habendum* in the mortgage deed is "*for, and during, and until the expiration of the term of years which the said Benjamin Rainsford hath therein;*" and the premises in question not being in his possession, it was the plaintiffs duty to have ascertained, from the tenant whether anything existed which would prevent Benjamin Rainsford from making an assignment by way of mortgage, for the remainder of the term. Benjamin Rainsford clearly had no right to make a second assignment, and the lessors of the plaintiff, under the circumstances, gain no title by reason of the registry of their mortgage—which is a second assignment. The eleventh section of the act expressly enacts that the act shall not extend to leases at a rack rent, or to leases not exceeding twenty-one years, where the possession and occupation goeth with the lease. The parties cannot, by their voluntary act of registry, in cases to which the act does not extend, draw to their acts the consequences provided by the legislature for another state of things.

The rule for entering a verdict for the lessor of the plaintiffs must be discharged, and the *postea* delivered to the defendant.

Rule discharged.

MOORE ET AL. V. THE GREAT WESTERN RAILWAY COMPANY.

Covenant—Agreement—to construct road-bed of railway—Assignments of breaches—Demurrer—Certainty—Engineer's certificate—Necessity for statement of his name—Dismissal of contractors, how pleaded.

The plaintiffs sued in covenant, on an agreement by which they had contracted to construct for the defendants the road-bed, in a certain section of a line of railway. It was provided that the whole should be in strict conformity with the specifications of the plaintiff's Chief Engineer; that the payments stipulated for should be made upon his written certificate; that in certain events he should have power in his discretion to take the work out of the plaintiff's hands, and to re-let the same to others at the plaintiff's expense—in which case the plaintiffs should forfeit all moneys due to them on account of the contract. Specifications were added of the manner in which the several kinds of work should be performed, in which it was expressed that the foundation should be of such description as the work should require, and might in some cases be constructed by means of piles driven in and arranged according to the directions of the engineer. In a copy of prices annexed to the agreement, and which had been accepted by the plaintiffs, one item was, "Price for piling—Piling in foundations, per lineal foot, 30 cents.

In assigning the first nine breaches the plaintiffs averred, that *although* they did on, &c., drive certain large quantities of piles, to wit, (setting out the number in lineal feet), and *although* the Chief Engineer did, before taking the work out of the plaintiffs hands, to wit, on, &c., by his written certificate, specify the amount of the said piling, yet that the defendants had not paid therefor according to the rates agreed on.

Held, on demurrer, that these breaches were not well assigned, for the following reasons:—

1. That, as the plaintiffs averred that the engineer had taken the works out of their hands, and as under the agreement, they had thereby forfeited all claim, they should also have shewn that their dismissal did not arise from any fault on their part.
2. That it should have been averred that the quantity of piling done entitled the plaintiffs to a certain specified sum, and the non-payment of that sum should have been stated as a breach: also that the piling should have been shewn to have been done in "Piling in foundations," as it was only for such piling that any price was specified.
3. That the fact of the engineer having given his certificate, being a material fact, should have been stated positively, and not merely by way of recital: and the name of the engineer should have been given.

For a tenth breach the plaintiffs averred, that, after the agreement, certain explanations, plans, &c., became necessary to enable them to carry on the work, but that the engineer, though requested, refused to furnish the same.

Held bad; for as the declaration shewed that certain specifications were annexed to the contract, according to which the plaintiffs were to construct the work, it should have been shewn in respect to what part or description of the work they required *additional* directions: and also that the name of the engineer should have been stated.

As an eleventh breach the plaintiffs averred, that after they had commenced the work according to the agreement, and while they were carrying on the same, the defendants wrongfully and unlawfully ordered them not to proceed, and then wholly dismissed them.

Held, not necessary to shew a more formal dismissal.

The plaintiffs sued in covenant on a sealed agreement, by which they contracted to construct and complete the

"road-bed" in a certain section of a line of railway at certain prices, which the defendants stipulated to pay them, for each description of work.

By this agreement the plaintiffs covenanted, that on the section number one, as marked out by the engineer of the Company upon a map in the Company's office, they would, under the inspection and direction of the Company's engineer appointed, or to be appointed, construct the road in a good substantial and workmanlike manner, and in every respect complete the road-bed and every other work, matter and thing incident to it, finding all the materials; the whole to be in strict conformity with the engineer's specifications annexed to the contract, and signed by the parties, and with such plans, sections, and drawings as should from time to time be furnished by the engineer of the company for the guidance of the contractors; the said road-bed to be commenced by the plaintiffs on or before the 1st of February, 1851, and to be in every respect completed, so as to be ready to receive the railways, on or before the first of November, 1852 to the satisfaction of the Company's engineer, to be by him testified to the Company by his final report and certificate to that effect in writing. And in consideration of the works thereby contracted for and agreed to be constructed and completed, the defendants covenanted that they would pay, or cause to be paid to the plaintiffs, the rates and prices specified in a paper annexed; *such payments to be made from time to time, upon the written certificate of the Company's chief engineer, specifying his estimate of the amount of work done and materials furnished;* but that it should be lawful for the company to withhold from the plaintiffs ten per cent. out of each estimate and certificate until the completion of the works to the satisfaction of the chief engineer and acceptance of the same by the company, which ten per cent. should be paid with the last instalment within ten days after the chief engineer should have delivered to the Company his final estimate of work done, and materials furnished, with detailed measurements; and his certificate of the work having been fully completed to his satisfaction, and in accordance with the contract.

Then the agreement contained stipulations *that in certain events the chief engineer should have the power in his discretion to take the work, or any part of it, out of the plaintiffs' hands, and to re-let the same to others, or to employ workmen to finish it, at the expense of the plaintiffs; "in which case the plaintiffs are to be liable for all damages and expenditure incurred by the Company in consequence, and shall forfeit all moneys due to them by the Company on account of the contract," as well as the ten per cent. retained: also, that in case of failure in their contract, the contractors should forfeit all moneys due to them under the contract, as well as the ten per cent. withheld; also, that if any work should be done by the plaintiffs, not included in the contract, the price and value of such work should be determined by the engineer; and that the said work, during its progress, should be subject to the supervision and inspection of the engineer, and be made to conform in every respect to his directions; also, that the chief engineer should determine the amount and quantity of the several kinds of work contracted to be done, and decide every question that could or might arise, relating to the construction of the work, and that his decision should be final and conclusive.*

Then specifications were inserted of the manner in which the several kinds of work should be performed, among which it was expressed that "the foundation will be of such description as the work requires, and may, in some localities, consist of piles driven as near together as practicable, and the spaces filled in with layers of concrete, or if the engineer deems proper, the heads of the piles are to be dressed off, and timbers framed into them, &c."

The whole to be executed in a substantial, faithful, and workmanlike manner, subject to the constant supervision and inspection of the engineer, who shall give such directions from time to time, additional to, and explanatory of the specifications, as occasion may require. There was annexed to the agreement a copy of the plaintiff's proposal of prices, which had been accepted, and which the Company agreed to pay, one item of which was "*Price for piling—piling in foundations per lineal foot, thirty cents.*" Nothing

more than what is above stated was mentioned in the contract, or papers referred to on the particular subject of piling.

The plaintiffs in their declaration assigned as their first breach of this covenant by the defendants, that *although* they, the plaintiffs, had always performed and kept all things mentioned in the agreement to be by them performed and kept; and *although* they did commence the said work according to their covenant in that behalf, and in the execution of the said work, did, on and before the first day of July, after making the agreement, drive a large quantity, to wit, 13,990 lineal feet of piles, under and by the directions of the chief engineer of the said Company; and *although* the said engineer did afterwards, and before the said engineer had taken the said works, or any part thereof, out of the hands of the said plaintiffs, to wit, on the day last aforesaid, by his written certificate specify his estimate of the amount of the said piling so done by the plaintiffs, to be 13,990 lineal feet, of which the said Company then had notice; yet the said plaintiffs say, that the said Company did not then pay, nor have they yet paid to the plaintiffs therefor, *according to the rates mentioned in the proposal of the said plaintiffs*, as in the agreement in that behalf mentioned, or any part thereof, although the said plaintiffs then demanded the same, &c.

The plaintiffs then assigned, as a second breach of the covenant, that they did afterwards, and before the 1st day of August next after making the agreement, in the execution of their contract, drive a certain other large quantity of piles, under and by the direction of the said engineer, which together with the quantity above mentioned, amounted to 28,000 lineal feet, and *although* the said engineer did afterwards, and before he had taken the said works, or any part thereof, out of the hands of the said plaintiffs, to wit, on the day last aforesaid, by his written certificate, specify his estimate of the piling so done by the plaintiffs up to that day to be the amount last aforesaid, of which the said Company then had notice, yet the said company hath not paid therefor after the rates mentioned in the said proposal of the plaintiffs, or any part thereof, although the said Company was then requested to pay the same, &c.

In a third assignment of a breach, the plaintiffs claimed exactly in the same terms for 29,300 lineal feet of piling in all, done before the first of September.

In a fourth assignment of breach, they claimed for 34,544 lineal feet of piling in all, done before the 31st of October, exactly in the same terms, except that in this breach the works "although the said Company was then requested to pay the same," were omitted.

In a fifth assignment of breach, they claimed for 64,350 feet of piling in all, done before the 30th November, 1850, exactly in the same terms as in the fourth breach, omitting the allegation of a request to the Company to pay.

In a sixth assignment of breach, they claimed for 64,350 lineal feet piling in all, done before the 1st January, 1851. This breach was charged in the same terms as the fourth and fifth, omitting the allegation of request to the defendants to pay.

In the seventh and eighth assignment of breaches the plaintiffs claimed exactly in the same terms as in the sixth, for increased quantities of piling done before the days there-in mentioned, not alleging a request to pay.

In a ninth assignment of a breach, they charged that after the commencement of the work, and before the 1st of March, 1852, and in execution of the contract, they drove a large quantity of piling, *of the kind and character mentioned in the said proposal of the plaintiffs*, by and according to the directions of the said engineer, to wit, 69,348 lineal feet; and that, *although* the said engineer did afterwards, and before the said work, or any part thereof, was taken out of the hands of the said plaintiffs, and before the commencement of this suit, to wit, on the day and year last aforesaid, by his written certificate, specify his estimate of the amount of the said piling, &c., of which the said Company then had notice, yet the said defendants did not then pay, nor have they yet paid to the plaintiffs therefor, according to the rate mentioned in the said proposal, &c., or any part thereof, &c.:—omitting any allegation of request.

In an assignment of a tenth breach, the plaintiffs declared that after the agreement—viz., on the 1st of February, 1851,

and on divers other days between that day and the commencement of this suit, it became necessary for the completion of the said work, &c., and for the information, assistance, and guidance, of the plaintiffs in the execution thereof for the plaintiffs to be furnished with explanations, directions, plans, sections, and drawings, of and concerning the said work; yet that neither the said Company nor the said engineer did furnish the plaintiffs with such explanations, &c., as were necessary to enable them to execute the said work when required, according to the said articles of agreement, and the plaintiffs' covenant in that behalf—although the said plaintiffs, on the day last aforesaid and on the said other days, and before the commencement of this suit, demanded the same from the said engineer, who then and on the said other days refused to give such explanations, directions, plans, sections, and drawings; whereby the plaintiffs were greatly hindered and delayed in executing the said work, contrary to the said agreement, &c.

The plaintiffs assigned also, as an eleventh breach, that after they had commenced the work, according to the agreement, and while they were carrying on the same, and before this suit—viz., on the 26th of March, 1852, *the defendants wrongfully and unlawfully ordered the plaintiffs not to proceed with the said work, and then whollg dismissed them from further prosecuting the same*, contrary to the true intent and meaning of the said agreement and of the defendants' covenant; whereby the plaintiffs were wrongfully hindered from carrying on and completing the said work, and from making great gains, &c., and also lost divers large sums of money earned and due from the defendants to the plaintiffs, for work done upon the same, and for materials furnished, &c.; and also the said ten per cent. withheld from the plaintiffs on work and materials upon which the defendants have made payments; and so the defendants have broken their said contract, &c.

To all these breaches the defendants demurred specially, assigning a variety of causes in respect of each; which, so far as they are material to the decision of the case, will be found in the judgment.

Cameron, Q. C., and *Vankoughnet*, Q. C., for the demurrer, cited as to the first nine breaches, *Gatty v. Field*, 9 Q. B. R. 431; *Sturge v. Rahn*, 4 Ex. 646; *Applemans v. Blanche*, 14 M. & W. 154; *Esdaile v. McLean*, 15 M. & W. 277; *Webster v. Crouch*, 2 Ex. 555. As to the tenth and eleventh breaches, *Nash v. Breeze*, 11 M. & W. 352; *Pontifex v. Wilkinson*, 1 C. B. 75; *Hayward v. Bennett*, 3 C. B. 404; 5 C. B. 593, S. C.

Freeman (with him *Read*), contra, cited *Bissex v. Bissex*, 3 Burr. 1729; *Nash v. Brown*, 13 Jur. 126; *Elkins v. Evans*, 2 U. C. R. 144; *Rowe v. Roach*, 1 M. & S. 304; *Tigar v. Gordon*, 9 M. & W. 347; *Ryalls v. Bramall*, 1 Ex. 734; *Ewart v. Bowes*, 5 U. C. R. 445; *Reynolds v. Shuter*, 3 U. C. R. 377; *Brymer v. The Thames Company*, 2 Ex. 549; *McIntosh v. The Midland Counties Railway*, 14 M. & W. 548; *Cort v. The Ambergate, Nottingham, Boston, and Eastern Railroad Company*, 15 Jur. 877; *Wilkes v. Atkinson*, 1 Marshal, 412; *Wood v. The Copper Miners' Company* 7 C. B. 906; *Jones v. Connock*, 17 L. J. (Ex.) 371; *Kemble, v. Mills*, 1 M. & Gr. 757.

ROBINSON, C. J., delivered the judgment of the court.

As regards the first, second, third, fourth, fifth, and sixth breaches, I am of opinion that they are not well assigned, in the following respects. The plaintiffs themselves give us to understand that they did not complete the work, but that the engineer had taken it for some reasons out of their hands; and yet they claim it to be their right, and, as a matter of course under the contract, that they should be paid for what they had done, according to the engineer's certificate. But that is not so; for if the work was taken out of the plaintiffs' hands, by reason of their failure to do what they had agreed to do, then, according to the express terms of the agreement, they had forfeited all claim to anything that might otherwise be due to them under the contract; and the plaintiffs having themselves stated that the work has been taken out of their hands, we are not to presume that that was done wrongfully without a cause. They should therefore either have told us something more than they have done, or not told us so much. They should have shewed

that, though they had lost the job, it was not from any failure on their part, and so that their dismissal, notwithstanding the clause on that point in the agreement, could not interfere with their right to recover for what they had done.

I think also, that as the plaintiffs are in this action claiming, under those breaches, a certain sum of money as a stipulated compensation for certain work, and not suing, as in case of tort, for general damages, to be measured by the discretion of a jury, they ought to have averred that the quantity of piling done entitled them to receive a certain specified sum, under the contract; and should have claimed that sum, or rather should have stated in the breach the non-payment of the same, or any part thereof, mentioning the amount. The piling is not stated to be done "in piling in foundations," and it is only for piling so done that any price is specified in contract. It may be that piling could not, in the nature of things, be required for any other purpose; but if that be so, which I do not assert, it could only shew that the plaintiffs could with truth have claimed the price, fixed, as being for "piling in foundations," and they should have done so, and brought themselves within that item in the specifications. We cannot know judicially that all piling must inevitably be for the purpose of foundations; it is no principle of law: and even if it were clearly shewn that the piling done was such as must have entitled the plaintiffs under the contract to the thirty cents per lineal foot, still, in my opinion, the plaintiffs should have stated the sum to which they were entitled, because the jury must found their verdict upon it.

We think also that the plaintiffs have not stated their cause of action in a manner sufficiently direct and positive. They should have averred that they did the piling upon the section, as marked out by A. B., the chief engineer, upon the map referred to, under his direction, and in a good and workmanlike manner, in conformity with his specifications, and to his satisfaction, and should then have averred that the engineer gave his certificate of the amount of work done, &c. Instead of this, it is put by way of recital, the allegation in the first breach being,

that *although* the plaintiff did such and such work, and *although* the engineer gave his certificate, &c. I incline to think the name of the engineer should have been stated, because the plaintiffs can claim for no work except under a certificate—it is the foundation of their claim; and the giving of this indispensable certificate is therefore a material traversable fact; but as it is alleged here, the traverse could only be that *the chief engineer* did not give such certificate, &c., which might be taken as a denial either that any certificate was given, or that the person who gave it was the company's engineer. We could not tell what was intended to be denied. This is not mere inducement; it is something necessary to be shewn as the foundation for a recovery. The plaintiffs could not but have knowledge of the person whose certificate they held; they should therefore have stated his name, in order that it might appear whose certificate they relied upon. The defendants in that case could take a single and proper issue, according as they might choose to deny either that the person so named was the proper person to certify, or that he did in fact certify.

For these reasons, I think the first, second, third, fourth, fifth and sixth breaches are badly assigned; and the seventh, eighth, and ninth are subject to the same exceptions, and are also insufficient in my opinion.

The tenth breach is for a default of another kind—that is, for not furnishing the plaintiffs with explanations, directions, plans, &c., which were necessary for enabling them to go on with their contract. The declaration shews that there were specifications of the work annexed to the contract; and we must suppose in the absence of any averment to the contrary, that these were sufficient, unless alterations should be made in the method of doing the work, which the company, through their engineer, were to be always at liberty to introduce. But it might be that, besides what the specifications expressed, additional directions might be required; and there is in the agreement a stipulation “that the company's engineer shall give such directions from time to time, additional to and explanatory to the specifications, as occasion may require.” I see no reason

to doubt that any refusal or neglect of the engineer to do, on the request of the plaintiffs, whatever occasion might require in this respect, would subject the defendants to an action as for a breach of their covenant. The question is, whether a good cause of action of that description is stated in this assignment of the breach. The plaintiffs ought, I think, to have averred that they had commenced and were prosecuting their work; or that they desired to commence it, and could not till furnished with certain additional directions. But I am not clear that laying the breach as they have done in that respect is fatal. It is, however, my opinion, that as the parties had contracted for the work to be done according to certain plans and specifications annexed, we cannot understand the plaintiffs to be complaining that the defendants, or their engineer, never furnished any plans or directions, whereby they (the plaintiffs) were wholly disabled from proceeding; but that—either in consequence of some alterations being made, or by reason of some deficiency in the specifications that had been furnished—the plaintiffs found it necessary to require, and did require, additional or explanatory directions. To enable the plaintiffs to recover in consequence of a failure to give them such directions, it appears to me they must shew in respect to what description or part of the work they required additional directions, and that they did require such directions. Then the defendants would know what refusal or neglect they were charged with, and the jury would have something to guide them as to the necessity of the directions, and the damages which the want of them might have occasioned.

For all that is stated in the declaration, the plaintiffs, immediately after signing the contract, might have demanded of the engineer to give, in the words of the contract, "all such explanations, directions, &c., as were necessary for enabling them to execute their contract," as if no specifications at all had been furnished, and pointing out nothing as to which they wanted further information. The engineer, in reply to such a request, might reasonably answer that they had their specifications and directions already; and yet the

plaintiffs may, by this general and vague manner of declaring, bring up the question whether all these long specifications, going into a multitude of particulars, were sufficient as a guide for every part of the work, without pointing out in what respect they failed. This would be a most inconvenient issue to try, and a very difficult charge for the defendants to meet.

The plaintiffs should have averred that it was necessary for them to have certain additional plans or directions for doing some certain parts of the work; that they had requested such plans or directions, &c., and had not received them.

I think, on special demurrer, the tenth breach is not sufficiently assigned, and that there should have been an averment that a certain person (naming him) was at the time chief engineer of the company; that they requested of him, as such chief engineer, to furnish the directions, &c., required for doing some particular work; and that he refused or neglected to give them.

The eleventh breach is in substance for the wrongfully preventing the plaintiffs from going on with the work. The declaration states that *while the plaintiffs were carrying on the work* (not alleging that they were carrying it on, and had carried it on, according to the contract), the defendants wrongfully and unlawfully *ordered them not to proceed with it*, and then wholly dismissed them from further prosecuting the same, contrary to their covenant. The case cited, of Cort v. The Ambergate Railroad Company, supports this breach against the objection relied upon—that the plaintiffs should have shewn a dismissal by a formal binding order of the board, or an actual prevention of the plaintiffs from going on with the work. We think this breach is in substance sufficient, or at least that it is not bad for any of the causes of demurrer pointed out.

If the plaintiffs had subjected themselves to be rightfully dismissed, the defendants should have shewn that by a plea. I think, as the contract expressly provides for the defendants' dismissing the plaintiffs in case of any failure on their part, the plaintiffs should, in point of form, have averred

that they were carrying on the work according to the contract, but that the defendants nevertheless wrongfully dismissed them. The defendants, however, have not taken any such exception, and the plaintiffs' averments that the defendants wrongfully dismissed them does imply that their was no failure on their part; so that the defendants might have shewn that the plaintiffs had incurred their dismissal by a failure on their own part, if the facts were so. We think the plaintiffs entitled to judgment on the eleventh breach, and the defendants on the others.

DRAPER, J., and BURNS, J., concurred.

Judgment on demurrer for plaintiffs on the eleventh breach, and for defendants on the others.

PRINGLE, CLERK OF THE PEACE, v. McDONALD, TREASURER
OF THE UNITED COUNTIES OF STORMONT, DUNDAS, AND
GLENGARY.

Clerk of the peace—fees.

A Municipal Council, in 1850, passed a vote assigning to the Clerk of the Peace a fixed salary for that year, "in lieu of all fees." Held (the Jury Act 13 & 14 Vic. ch. 55, having been subsequently passed), that this could not debar him from claiming the fees allowed by the statutes for preparing the jury books for the following year.

Brough, in Easter term, obtained a rule *nisi* on the treasurer to shew cause why he should not be compelled to pay over to Pringle, clerk of the peace 90*l.* 8*s.* 9*d.*, being the balance of money due him for services rendered by him in 1850, as clerk of the peace, in preparing the jurors' book for 1851, and other services rendered by him pursuant to the statutes 13 & 14 Vic. ch. 55, according to an account delivered in by him on the 3rd of October, 1851.

Mr. Pringle filed an affidavit of a demand made on the treasurer, who refused to pay the above balance, giving only as his reason that the council objected to his doing so, considering that the salary voted to him of 150*l.* per annum in January, 1850, as clerk of the peace and township clerk, "in lieu of all fees," precluded his making a demand for the services rendered by him in 1850, in preparing jurors' lists and other services for procuring juries for the year

1851, for which services fees are assigned to the clerk of the peace by the statute passed in 1850.

The question was, whether the council assigning to Mr. Pringle in 1850, by their vote of January in that year, a salary of 150*l.* for the current year, in lieu of all fees, debarred him from claiming the fees assigned by the Jury Act to the clerk of the peace for services rendered under that and the former Jury Act. The fees came to about 190*l.*, of which the treasurer paid to Mr. Pringle 100*l.* on account, but on the understanding that such payment was not to prejudice the question now raised, and was to be refunded, if his claim should be found illegal.

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think the applicant is entitled to have this rule made absolute. The 12th Victoria, chapter 81, section 81, makes it the duty of the treasurer to pay the fees assigned by that act to the clerk of the peace; and this, therefore, is a case in which the court may grant a *mandamus* to the treasurer at once, though he is a subordinate officer.

Upon the reason of the thing, we think it cannot be held that, because the municipal council has assigned to the clerk of the peace a salary of 150*l.* a-year for discharging what were then his duties, he is therefore compelled to forego the remuneration which the legislature have, by an act subsequently passed, directed to be paid to him for other duties, which are wholly additional. The effect would be, in this case, that his whole salary would be less than the fees which the legislature has thought it fit to grant for new and very troublesome duties; and besides losing the difference, he would have to go unremunerated for all his other services.

The council may in their discretion revise their regulation of his salary, in consequence of the change made in his duties, if they can insist upon his being paid by a fixed salary, but it would be unreasonable and unjust to hold that he must be limited to his present salary, and receive nothing for doing the new duties. The council cannot thus deprive him of the fees which a statute of the province allows to him.

Rule absolute.

THE EARL OF ELGIN V. CROSBY.

Administration bond, action on—Practice.

The next of kin cannot claim substantial damages in an action on an administration bond, where no decree for distribution has been obtained, by shewing merely that the administrator has *received* moneys for the estate.

The proper course for the defendant in such case is, to apply to the court to stay proceedings on the bond until a decree for distribution has been obtained.

The action was by his Excellency Lord Elgin, Governor General of Canada, and was brought on a bond taken under our Court of Probate Act, 33 Geo. III. ch. 8, to one of his Lordship's predecessors in the Government of Upper Canada, to secure the due administration of the effects of one Wells, by the administrators of his estate (Patton and Bastedo.) This defendant gave the bond sued on as one of their sureties.

The breaches assigned were, 1st. That the administrators did not well and duly administer, but wasted the goods of the estate.

2ndly. That they did not make and render a just and true account of their administration on or before the 1st of November, 1833, (the day named in the bond).

The defendant, besides the 7th, 10th, and 12th pleas, which were demurred to, and held insufficient (a), pleaded, 1st, *Non est factum*.

2ndly, That Patton and Bastedo never were administrators.

3rdly, That no goods of Wells came to their hands.

4thly, That Patton and Bastedo duly administered all that ever came to their hands.

5thly, That the administrators did not waste any of the goods, &c., that came to their hands.

6thly, To the second breach, for not accounting—that the administrators did duly account, &c.

8thly. That the administrators were unable, by using all due diligence, to complete their administration by the 1st of November, 1833; and that the performance of the condition, as regards the rendering an account of the administration on or before that day, became impossible.

To which the plaintiff replied, "*De injuria*."

9thly, General performance of all the conditions in the bond.

11thly, *Nunquam indebitatus*.

At the trial, before Draper, J., at Woodstock, a verdict was given for the plaintiff for 80*l.*, on account of money received and not distributed or applied according to law; subject to the exception taken at the trial, that no action can be brought on a bond of this description until the administrators have by a proper proceeding been cited to account in the Probate or Surrogate Court, (as the case may be), and a default ascertained and pronounced upon there. The action was proved to have been brought at the instance of a son of the intestate.

Hagarty, Q. C., accordingly moved for a nonsuit, or that a verdict be entered for the plaintiff on the leave reserved at the trial; he cited *Archbishop of Canterbury v. Wills*. 1 Salk. 315; *Greenside v. Benson*, 3 Atk. 248; *Archbishop of Canterbury v. Thomas*, 1 Cox, 399.

Leith shewed cause, and cited *Archbishop of Canterbury v. Robertson*, 3 Tyr. 416.

ROBINSON, C. J., delivered the judgment of the court.

The pleadings in this action were before us last term on demurrers to three of the defendant's pleas. The judgment given by us then was not upon any point brought up on the argument of this rule. In England these bonds for securing due administration have been seldom made use of in the Common Law Courts, and there are but few cases to guide us in deciding any points which may be presented in actions upon them.

The bond taken under our Court of Probate Act is precisely in the same form with regard to the condition, as the bonds taken in England under 22 & 23 Car. II. ch. 10, for the same purpose—the conditions, and object, and effect of which bonds are clearly stated by Lord Tenterden, in his judgment given in the *Archbishop of Canterbury v. Tappen* (8 B. & C. 151). After examining that judgment and the case more recently decided of *Archbishop of Canterbury v. Robertson* (3 Tyr. 416), we have to consider that in the case now before us we have the next of kin or one of the next

of kin, of an intestate, suing in the name of the Judge of the Court of Probate upon an administration bond: that no decree is shewn to have been made in favour of the next of kin, directing distribution of what has remained after payment of debts; and that the plaintiff (by which I mean the person promoting the suit) is claiming substantial damages on no other ground than because he has shewn to the satisfaction of the jury that the administrators, or one of them, received a sum of money, which, for all that appears, may be still in hand not wasted or misapplied, but merely not shewn to have been administered, either in paying debts, or otherwise—and this, too, in a case in which it was proved that there is a judgment debt due by the estate more than sufficient to cover all the assets shewn to have been received. The judgment of the Court of Exchequer in the case of the Archbishop of Canterbury v. Robertson, appears to us to be a clear authority for holding that under such circumstances the plaintiff can recover nothing more than nominal damages.

And if it appears hard that, when a suit has been thus brought on the bond in the name of the judge, but at the instance of a party not entitled to recover substantial damages, the obligees should be subjected to costs, by having nominal damages awarded against them,—the answer to that is, that, instead of pleading a number of false pleas, which entitles the plaintiff to costs, the defendant might have taken the course suggested in the case of the Archbishop of Canterbury v. House (1 Cowp. 140), and applied to this court to stay the proceedings on the bond, until a decree for distribution had been obtained.

If this verdict for 80*l.* could be supported on what was proved in this case, then, whenever the next of kin could show that the administrator had assets in his hands, he could put the bond in suit, though it might be yet uncertain whether he would ever have a claim to anything.

The learned judge will settle the verdict upon the different issues, according to the understanding at the trial.

We could not properly make the rule absolute, either for a nonsuit or verdict for defendant, because the plaintiff

has a judgment on demurrer on some of the pleas, and is entitled to nominal damages on other pleas. We can only dispose of the case by granting a new trial, without costs, unless the plaintiff will consent to take a verdict for a shilling.

Rule accordingly.

WILLIAMS V. NOXON

Promissory Note—Fictitious payee.

Where a note is made payable to a fictitious payee, and not to his order or bearer, a person receiving it from a third party for value cannot maintain an action against the maker by declaring as on a note payable to bearer.

This was an action brought upon a promissory note, of which the following is a copy :

“*Hillier, Oct. 28th, 1847.*

“Eighteen months after date, I promise to pay J. E. McMillan the sum of seventy-five pounds, H. Cy., with interest. Value received.

“Witness present, (Signed) “GILBERT NOXON.”
(Signed) “Jonathan D. Morden.”

The point preserved on the trial was, whether the plaintiff could recover the amount thereof under a count describing it as a note payable generally to bearer, or under any of the counts in the declaration,—the payee in the said note being a fictitious payee, which the defendant knew at the time of making said note ; and the plaintiff having taken and received the said note in good faith, not being aware that the payee, J. E. McMillan, was a fictitious payee—and he, the plaintiff, having given value for the said note to one Selim Pettit, who received the note from the defendant.

Richards for the plaintiff.—The law will intend that this is in some way a contract binding on the defendant, and it can only be enforced by treating it as a note payable to bearer. It is analagous to a note payable to one's own order, which may be declared on as payable to bearer.—*Hooper v. Williams*, 2 Ex. 13. In *Cruchley v. Clarence*, 2 M. & S. 90, the note was made payable to the order of—, and *Le Blanc, J.*, considered it the same as if payable to bearer : the insertion of a fictitious payee can have no other effect. He referred also to *Bennett v. Farnell*, 1 Camp. 130, and to the cases cited in the judgment.

Patterson, contra. The plaintiff should have enquired who the payee was. The cases cited are all on instruments payable to order or bearer, and therefore purporting to be negotiable. If the payee had been in existence, the plaintiff could not have sued, and there is no reason why he should be put in a better position because there happened to be no such person.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff cannot recover in this case, and that a verdict for the defendant should be entered or a nonsuit, if the plaintiff can have any reason for desiring that in preference. There being no privity shewn between the plaintiff and defendant, apart from the note—that is, no transaction between them which can support a recovery on any of the common counts—the single question is, whether on a promissory note knowingly made payable by the maker to a fictitious payee, any person who takes it for value from a third party—that is, not from the maker—can maintain an action upon it by declaring as on a bill payable generally to bearer. We think he cannot; and that the cases of *Collins v. Emmett* (1 H. Bl. 313), and of *Gibson v. Minet* (3 T. R. 481, 1 H. Bl. 569), give no support to such an action. In the elaborate opinions delivered by the judges in the House of Lords, while the case of *Gibson v. Minet* was depending there in error, it happened that they sometimes spoke of a bill made payable to a fictitious payee, without being careful to add, “or order,” and so may be thought to be speaking of a bill which, like this note, was simply made payable to a person not in existence, and without the words “or order” or “or bearer,” and so wanting even the appearance of being indebted to be negotiable; but it is clear they never meant to apply their observations to a paper of that kind. There was no necessity that they should, indeed; for in that case of *Gibson v. Minet* as well as the cases cited in it, the question was only raised in respect to a bill professing on the face of it to be negotiable, and even in respect to such a bill the Lord Chancellor, and some of the judges of great eminence, thought it impossible that the party could legally recover as on a bill payable to bearer.

The difference between such cases and the present is obvious. In all of them the purchaser of the bill or note, ignorant that the payee was an imaginary person, might well believe that he was acquiring a good negotiable security, in the ordinary course of business : but this plaintiff, taking a note payable to McMillan alone, and not to his order or to bearer, had no reason to imagine that he was becoming the holder of a note on which he could possibly bring an action, or in which he could hold a legal interest. His situation is not changed in point of law by McMillan being a fictitious person ; for if he had been a real person the plaintiff could not have taken a real interest in the note, either by endorsement or delivery from him. The whole reasoning on which an action as upon a note payable to bearer has been sustained in the cases referred to, fails in this case. In *Collis v. Emmett*, Lord Loughborough says, "When a security is negotiated, on which, by the terms of it, the party receiving it, apprehends he has a clear right to recover, and by the insertion of the name of a fictitious person his recovery is impeded, (it being impossible to prove the order of a person who has no existence), it should seem in point of law, precisely the same in effect as if it had been made payable to bearer." In *Gibson v. Minet*, all the judges speak of the fraud of affecting *to put a bill in circulation* under circumstances which makes its circulation impossible.

The note before us was a note apparently not intended to circulate ; it could not circulate legally. One of the learned judges says in the case referred to (p. 589), "In the case of drawing bills of exchange to the order of a fictitious payee, the drawer and acceptor, knowing the fact, have no reason to complain of any injury to them." Now, in this case, the plaintiff must have known well that he was taking a bill which by law was not negotiable, any more than an agreement to deliver merchandise ; and he has no reason to complain that he is impeded in his recovery by any fraud, for if the payee had been real he would have been equally unable to sue.

Rule absolute.

COTTON V. STOKES.

Interpleader—Trespass maintainable against the execution creditor.

The claimant of goods seized, by accepting an interpleader order, does not waive his right to bring trespass against the execution creditor for seizing and selling his goods.

A. having seized goods of B., which were claimed by C., a feigned issue was directed by the Court of Common Pleas between A. and C. to try the right. While this issue was pending, C. brought an action of trespass in this court against A. for taking the goods, and carried it down to trial at the same assizes with the interpleader issue.

The learned Chief Justice at Nisi Prius, refused to direct a nonsuit on the ground that such action could not be maintained during the pendency of the feigned issue; and the plaintiff, having succeeded on that issue—and having established a claim to damages in this action—was held clearly entitled to retain his verdict.

But *semble*, that such suit should not have been brought until the decision of the interpleader order, and that the defendant might have obtained a stay of proceedings on application to the proper court.

Trespass. For taking a quantity of lumber, and a number of saw-logs belonging to the plaintiff.

Pleas. First, not guilty; second that the lumber and saw-logs were not the property of the plaintiffs.

At the trial, before Robinson, C. J., at Toronto, the question to be determined was, whether a certain bill of sale by way of mortgage, given to this plaintiff by one Eaton, to whom the lumber and saw-logs had belonged, was given honestly and *bona fide* to secure a debt due by him to the plaintiff; or whether it was colourable or fraudulent, upon an understanding with the plaintiff, and in order to defeat executions at the suit of other creditors of Eaton.

The property was seized by the sheriff after the bill of sale was given, upon an execution which Stokes had taken out against the goods of Eaton, and upon other executions; and on the 28th of February, 1852, after the seizure, and after this plaintiff, Cotton, had made claim to the property under the bill of sale—the usual interpleader order was made at the instance of the sheriff, upon hearing the attorneys of Stokes (the execution-plaintiff,) and of Cotton (the now plaintiff), as well as of the sheriff, directing an issue in which Cotton should be plaintiff and Stokes defendants, to determine whether the goods, or any part of them, were the goods of Cotton at the time of the delivery of Stokes's

execution to the sheriff; the sheriff to withdraw from the possession of the goods in case satisfactory security should within six days be given to him for their safe keeping in the mean time, otherwise to proceed to sell under the execution.

No security was given, and the sheriff, in consequence, sold under the execution.

At the trial of this cause—after the plaintiff had given evidence in support of his bill of sale, to shew it made in good faith to secure a just debt, and to indemnify him for advances to be made, and liabilities assumed on account of Eaton—the defendant moved for a nonsuit, on the ground that while the interpleader suit was pending (which stood for trial at the same assizes) it was not competent to this plaintiff to proceed in this action for an alleged trespass in the execution creditor in seizing the property.

The learned Chief Justice held, that sitting at Nisi Prius, he had nothing to do but to try the issues upon the record in this case, as well as upon the feigned issue which had not yet been disposed of; but if the plaintiff could not consistently with the interpleader order carry on this suit, as he was doing, the proper remedy was, to have moved to stay his proceedings, or to move to restrain the plaintiff from entering up judgment on his verdict, or to set the verdict aside.

He considered, that though the sheriff's sale took place under the terms of the interpleader order, yet that it was the seizure of the goods by the sheriff which would be a trespass or not to Cotton, according as his mortgage should be ultimately held entitled to prevail; and that the sale, though it took place according to the terms of the order, was still a consequence of the seizure, and must ultimately be held to have been a wrongful act, if the seizure should be proved to have been wrongful.

Upon this direction given to the jury, they found that mortgage to have been given to Cotton in good faith, for a debt due. It was proved that at the sheriff's sale one Hutchinson had bid off the property, and paid nearly

300*l.* for it but upon some understanding between Cotton and him, the lumber had ultimately come into Cotton's possession.

The jury were told that the effect of that should be to limit the damages to the amount of the sum which Cotton had to pay in order to get the property into his hands, or to any reasonable recompense beyond that, for the charge he had been put to otherwise.

A verdict was thereupon found for the plaintiff for 300*l.*

Crooks obtained a rule *nisi* to stay all proceedings in this cause, and to set aside the verdict, and for a new trial without costs, on the law and evidence, and for misdirection and rejection of evidence, and for excessive damages, on affidavits filed; to which

Cameron, Q. C., shewed cause.—The act is only for the relief of the sheriff and other officers, who have a claim to protection; but the party who sets them in motion stands on a different footing, and is liable both in law and justice. The sheriff, even, is liable in trespass *quare clausum fregit*, for any excess accompanying the seizure—*Abbott v. Richards*, 15 M. & W. 194; *a fortiori*, therefore, may the execution creditor be sued. No such case has occurred in England, but where there is a clear injury there must be a remedy; and the plaintiff, having shewn himself entitled to damages, should be allowed to retain them.

Hagarty, Q. C., (with whom was *Crooks*), contra. There is no precedent for such an action as this; the parties having submitted to an interpleader issue, which is a creature of the law for that purpose, must be held to have referred the whole matter to the decision on that. The defendant might have obtained a stay of proceedings by applying to this court; and at all events there should be a new trial now, to enable him to plead a former recovery. He did nothing but what the law allowed, and nothing which could make him liable in trespass for consequential damages. If the plaintiff suffered any loss by the sale, it was his own fault, for he might have given security and taken the goods—but he did not choose to do so.

ROBINSON, C. J.—Both parties, upon the argument of this case, admitted that they could find no authority expressly bearing upon the question which this application brings up. The case of *Abbott v. Richards* (15 M. & W. 194) is certainly not in point, for there trespass was brought against the sheriff for proceeding to sell as directed by the very terms of the interpleader order, which was similar to the order issued in this case. The action was brought after the claimant of the goods had got a verdict in his favor upon the interpleader issue. At an early stage of the cause the sheriff moved the court of Exchequer, in which the action of trespass against him was pending, to stay proceedings in it, because the sheriff had done nothing but what he was permitted and bound to do under the interpleader order. The court did stay the proceedings, observing that the statute undoubtedly gave to the court full authority, in their discretion, to make such an order as they had made: and they add, “then when the court, or a judge, having a discretion so to do, orders the sheriff to sell the goods, it would be monstrous if he were afterwards to be held responsible in an action, for selling them under that order. “It would be doing,” they said, “a grievous injustice to the officer of the court,” and that was all which they intended to prohibit the defendant from doing. “The only question,” Baron Alderson said, was, “whether the court ought to allow the plaintiff *to go against the sheriff*, for the acts which were done by him, under the interpleader rule.”

The case now before us presents no such question. Undoubtedly, it seemed to me, when I was sitting at *Nisi Prius*, that it was repugnant to reason, and was altogether inconvenient, that while the interpleader issue from the Common Pleas was still untried, which was to determine whether Cotton, the claimant, was the owner of the goods or not, there should be going on in this court an action of trespass by Cotton—not against the sheriff, but against the execution creditor—for seizing the same goods, and that both should be standing for trial at the same assizes. The jury in the interpleader case might find in favor of Cotton, and

in the trespass case against him, or *vice versa*, which would be absurd—still, I considered, that all I had to do at Nisi Prius, was to dispose of the several cases before me, upon the issues raised in them. If there was anything wrong in the trespass case going on under the circumstances, the defendant should have moved the court in which it was proceeding to stay proceedings in it till after the interpleader issue had been finally been determined—or might still move to stay proceedings in this verdict, if the plaintiff had no right to carry the case down to trial. But now that we know by the result of the interpleader, that the goods were really Cotton's, I see no ground for staying proceedings.

It appears to me clear, upon the evidence, that Stokes, the defendant in this case, had made himself liable for the sheriff's act in seizing and selling. He urged the sale, and upon the application for the interpleader order, he came in, and, as the execution creditor, shewed himself desirous of contesting Cotton's claim, and vindicating his right to have the goods sold, at his own suit, to satisfy Eaton's debt. Now, what is the object, and what should be the effect of the interpleader order? There is no question here about protecting the sheriff against an action for anything he has done. So far as he is concerned, the object of the interpleader order has been answered; it is the execution creditor who is attacked in this action, who, we must understand from the very nature of the proceedings to which he has been a party, has been authorizing and directing the sheriff to sell at his suit, as the property of Eaton, his debtor, certain goods, which it is now ascertained were at the time the goods of Cotton. It can never be contemplated that under such circumstances the court should throw upon the claimant, who has established his right, the loss occasioned to him by his goods being sacrificed at sheriff's sale. The case of *Abbott v. Richards*, does indeed determine that the sheriff cannot be made answerable for that loss. Then who else can be liable but the execution creditor?

It can never have been meant that the claimant whose claim has been found good, must content himself with what

the goods may happen to have brought at sheriff's sale. Stokes, the execution creditor, was not, in the words of the Interpleader Act, "a person having no interest in the contest," about the right to the goods. He could not apply for protection under the statute, and why should he be protected from any of the consequences of his urging a claim found now to have been illegal? The whole object of the interpleader order was to protect a third party—namely, the sheriff—who stood indifferent in the dispute against the property by compelling Cotton and Stokes to try the question at their own expense. They have done so, and the goods are found to have been Cottons; and I can imagine no reason why he should be restrained from seeking his remedy against Stokes for the wrong done to him. If it was unreasonable and irregular for Cotton to be going on with the trespass suit while the interpleader issue was undetermined, Stokes should have moved in the proper court to stay the suit: but now that the verdict in the interpleader case shews the right to be with him, there is in my opinion no ground for throwing any impediment in the way of his proceedings.

The third clause of the Interpleader Act, 7 Vic. ch. 30, seems indeed to preclude any question upon this point, for it only holds the claimant of the goods excluded so far as regards the party who claimed no interest in them himself, and who on that ground had applied for the protection of the court; but it expressly saves to the claimant his right as against the other party in the contest about the property.

The affidavits relate to the value of the lumber, and are intended to shew the damages excessive, but they are in that respect repelled by affidavits filed on the part of the plaintiff.

BURNS, J.—The first question to determine is, whether,—after the plaintiff has appeared, when called on by the sheriff to maintain his claim upon the interpleader summons, and an order having been made directing the question of the right of property to be tried in a feigned issue,—there remains any longer a right of action for the trespass, supposing the goods to be his property, as against the

person who set the sheriff in motion. The Interpleader Act was passed for the benefit of the sheriff and his officers, and also for another class—viz., those who stood in the position of stake holders, having no interest in the subject matter of the suit. The 6th sec. of the act 7th Vic. ch. 30, is that the court, upon the application of the sheriff, shall call before it as well the party issuing the process as the party making the claim, and thereupon shall exercise for the adjustment of such claim, and for the relief and protection of the sheriff or other officers, all or any of the powers and authorities in the act before mentioned. As respects the seizure of goods, when an order has been obtained for the parties to interplead, no action after that can be maintained against the sheriff by the claimant; and if an action be brought the court will order it peremptorily to be stayed. *Abbott v. Richards* (15 M. & W. 110.) But if the sheriff does more than seize the goods, by means of which he is independently of that fact a trespasser, he is not protected against an action by having caused the parties to interplead. Though Barons Rolfe and Alderson did incline to be of the opinion in the case cited that the order might have extended to stay the action altogether, yet we find the Court of Common Pleas in the same year, and subsequent to that decision, solemnly deciding that no order under the Interpleader Act could protect the sheriff in an action for breaking and entering to seize the goods.—*Hollier v. Laury* (3 G. B. 334.) In this last cited case the action of trespass was against the sheriff and the execution creditors jointly, and the application to stay the proceedings was only made on behalf of the sheriff. The object of the Interpleader Act was to clothe the common law courts with the authority in the cases provided for which a third party would have by a suit in equity by an interpleader bill; and as it is said, was done because the latter was attended with expense and delay. Upon an interpleader bill in equity it was only the plaintiff who was protected against suits and actions by the other parties claiming an interest in the subject matter, and the interpleader suit did not in the least interfere with the rights the parties (defendants)

had, or might exercise against each other. The moment the sheriff seized upon the plaintiff's goods, he and the deputy, if he directed them to do so, were both trespassers, and at that instant the plaintiff had a cause of action against each of them. The sheriff afterwards entitles himself to be protected by taking the benefit of the law made for his protection, and the court as to him would stay proceedings; but as to the execution creditor, whether proceedings would be stayed might depend upon circumstances. If the sheriff obtained an interpleader summons, I do not see that the mere fact of the claimant appearing upon that summons would entitle the execution creditor to have proceedings against himself stayed; but if the claimant asked for any benefit or advantage in his own favor, to be provided for by the order, that would be a sufficient reason for putting him on terms, and perhaps staying his proceedings, for no order would be made in his favour unless upon such understanding; and if he did not consent then the order would simply be that the sheriff should execute the writ, and would bar the claimant from any remedy against the sheriff. With the consent of the parties, the court may dispose of the matter upon the merits, which will, of course, bind all the parties but merely appearing upon the summons does not give such consent, and in the absence of consent the court can only bind the parties so far as the statute has conferred authority, or as rights are bound as a necessary consequence of what is done. The legal right of action for taking the claimant's goods remains in him from the moment of seizure against every one guilty of the act until something comes in to protect the parties. The sheriff, so soon as he obtains the order, no matter in what form that order may be granted, then becomes, by operation of the statute, protected; but if the execution creditor requires protection, or can obtain it, he must derive it from the order itself. It is quite clear he can have no protection if the claimant neglects or refuses to appear to the sheriff's summons. If the claimant appears his rights are bound in no way further than he consents, except as against the sheriff; and if he neglects, or refuses to comply with

the order to be made after appearance, his rights as against the execution creditor will be saved to him. It seems to be entirely optional with the claimant whether he will accept the terms of the order or not.

The next question is, whether the evidence were sufficient to make out the defendant, the execution creditor, to be a trespasser. I think it was sufficient. The execution creditor, by maintaining the act of seizure, which he does by insisting upon an issue, for an issue can only be directed by his insisting upon it, adopts the act of the sheriff, and insists that the goods are the goods of his debtor, and that the sheriff is guilty of no trespass in taking the goods; and then his liability—for he then stands in the sheriff's place—has relation back to the time of the act of seizure. This is easily shewn by the fact, that if the execution creditor appears upon the summons, and states he never authorized the sheriff to seize the claimant's goods and he has no claim upon them, the sheriff must in such case himself compensate the claimant for the trespass he has committed. The learned Chief Justice could do no otherwise than he did at the trial. The facts established at the trial very well warranted the jury in finding the sum they did for the plaintiff; and there is no ground upon the affidavits as they are fully answered, to disturb the verdict.

I should apprehend that the defendant would still be in a position to stay the proceedings, upon terms, if the application were made to the proper court. This application depends upon the fact, whether the order made in the interpleader matter can be considered as imposing any terms upon the plaintiff, and whether the plaintiff has accepted of the terms of the interpleader order. As I have before stated, he was not bound to accept any terms, unless he pleased. The order provides for the plaintiff retaining the property, if he desires to do so, by giving security for the value. He elected not to give the security, but rather that the sheriff should sell. The sheriff did sell, and in such case the order directs him to pay the proceeds into the court; and we must presume the order has been complied with, and that the money is now in the court

from which the execution issued. The interpleader order further provides that the claimant and the execution creditor shall proceed to trial on a feigned issue, to determine the right of property in the goods seised; and that the claimant should be the plaintiff. Now, the plaintiff was at liberty to accept of this provision or not, as he pleased, even after the order was made, and if he did elect not to comply with it, then by the statute his rights are saved to him as against the execution creditor; but having excepted it—becoming plaintiff and carrying down the issue—can he also maintain an action of trespass at the same time? The result of the two cases in this instance shews, I think, that he must be bound to elect. The feigned issue has been decided in his favour, the consequence of which is, that the defendant never can obtain money out of court, paid in by the sheriff because that money is the proceeds of the plaintiff's goods, according to the verdict of the jury. The order of interpleader when entered of record, is declared to have the force and effect of a judgment, and that judgment, followed by the judgment that the goods were the plaintiff's entitles him to the proceeds paid into court, to abide the event as against every one, and could not be withheld from him. No one but the plaintiff has a legal title to ask the court for that money. Notwithstanding the plaintiff may so receive that money, yet he has obtained in this action a full compensation from this defendant for the same goods. The two things are unjust, and I should say cannot be allowed to exist. Going to the root of the matter, the plaintiff had his election to come in under the interpleader order, or to proceed upon his legal right against the defendant. If he chose to elect to accept the interpleader order, then, under that order he had the right further to elect whether he would retain the property in his own possession and give security, or let the sheriff sell and pay the money into court. He chose the latter, and still elected to go on with the feigned issue. Can he do so, and still proceed with an action of trespass? The only argument in favor of doing so is, that by reason of the trespass he may sustain a greater loss than the value of the property, or what it may

sell for. The money, the proceeds of the goods, is by the order directed to be paid into court which is for the security of the claimant. If he elected not to accept of the interpleader, the proceeds of the goods would of course at once have been paid over to the execution creditor. I should say the claimant, when he elects to accept of the provisions of the order in his favour, must be held bound to relinquish any claim upon the execution creditor unless, the claim be expressly exempted to him by the order, in case he elect to accept of the benefit of it, and such exemption might be in cases where damages *ultra* the value of the property existed; but it appears to me in all cases without such a reservation it must be understood that it is only the value of the property or the proceeds of the sale, that is accountable for upon the determination of the right of property. The claimant should I think, make his election in the first instance whether to accept of the benefit of the interpleader, or to proceed with an action of trespass if he claims damages beyond the value of the goods, or of such proceeds as they might bring upon a sheriff's sale; or, if he wishes to reserve certain rights in the event of accepting, then it should be specially provided for, and if not provided for he must be understood to waive all right to anything beyond the proceeds of the sale. According to *Hollier v. Laurie*, this is not the proper court to make the application in. The interpleader order was made in a case in the Common Pleas, and as the complaint is that the plaintiff is proceeding in the action before us contrary to the spirit, meaning, and effect of that order, the application should be to that court. The order for staying proceedings operates upon the person who is proceeding and not on the suit or proceedings themselves, and the other court is the place to have the order interpreted, and obedience to it enforced.— *Vide Harrison v. Wright*, 13 M. & W. 816.

DRAPER, J., concurred.

Rule discharged.

In re BILLINGS and THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF GLOUCESTER.

By-law to take Stock in Railroad, quashed.

A by-law to take stock in the Bytown and Prescott Railway was quashed.

1st. Because it appeared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vic. ch. 132. 2nd. Because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vic. ch. 81.

The defendants did not support their by-law, and the court refused to hear counsel on behalf of the railway company, as the rule was not directed to them.

Richards obtained a rule *nisi* to quash a by-law made on the 19th May, 1851, No. 35, entitled "A By-law authorizing the subscription of 5000*l.* in the capital stock of the Bytown and Prescott Railway Corporation."

1st. Because it provides for the creation of a debt, and yet imposes no special rate per annum for the payment of it, sufficient, according to the amount of returns, to satisfy such debt and interest within twenty years, as required by law,—the rate imposed being wholly inadequate.

2ndly. Because the time for payment is postponed beyond twenty years.

3rdly. And on other grounds (not stated), disclosed in affidavits.

This rule was served on the 20th August, on the reeve and clerk, and on the 31st of August, on the President of the Bytown and Prescott Railway Company.

An affidavit of *Billings*, the applicant, was filed on moving for the rule, in which he swore that he was the first settler in the township; that by the assessment returns of 1850, the whole ratable property in the township amounts only to 26,229*l.* 4*s.* 0*d.*, and that the returns for 1851, were not made out till after the by-law passed; and that at the meeting held for obtaining the assent of the majority of the inhabitants to the subscription, not more than seventy of the assessed inhabitants voted in favour of it.

A copy of the assessment roll was produced, which verified the above mentioned statement, as to the value of property assessed. There were about 400 names on the assessment roll.

The by-law recited the passing of the Bytown and Prescott Railway Company Act, 13 & 14 Vic. ch. 132; and the provisions made by it, which authorized the Municipality of any township in the vicinity to take stock in the Company, provided a majority of the assessed inhabitants of the township shall have first given their assent to the sum to be subscribed. It recited that such assent was given at a meeting regularly called, to subscribe 5000*l*. And it enacted that the Town Reeve of Gloucester be authorized to subscribe 500 shares, or 5000*l*.; that the Town Reeve might issue debentures in payment of the said stock, in sums of not less than 25*l*. as calls should be made; that such debentures should bear interest from the date, at six per cent. per annum, payable half yearly, and should be signed by the town reeve and treasurer; that they should be made payable on the 1st of November, 1871; and that for the payment thereof, there should be raised upon the whole ratable property within the township of Gloucester a special rate in each year, and in addition to all other rates, of a halfpenny in the pound; until the debentures and interest should be paid; and that till the whole of the debentures should have been issued, there should be raised in each year for the payment of the debentures actually issued a portion only of the said rate, bearing such a proportion to the rate as the debentures issued should bear to the whole amount authorized to be issued.

Eccles appeared on behalf of the railway company, but the court declined to hear him, as the rule did not call upon the company.

The defendants did not support their by-law.

ROBINSON, C. J., delivered the judgment of the court.

We have no discretion to avoid making the rule absolute for quashing this by-law; it may be, for anything that we know, that the debentures have been issued upon it, and are now held by persons who have advanced money upon them, but we cannot trace them in order to bring the holders into court to answer this rule; and the act 12 Vic. ch. 81, sec. 155, makes it our duty, "upon proof of service of a rule to shew cause upon the corporation," to set aside any

by-law or part of a by-law, which may be brought before us by any resident of any township in which the by-law has been passed, or by any person having an interest in its provisions, if we find it to be in the whole, or in part illegal.

Then the corporation, having been served, take no steps to vindicate their by-law.

If they are aware that nothing has been done under it, and are conscious of its illegality, they may well be excused for not attempting to support it; but if they have issued debentures upon it, and received moneys, we should expect them to make some effort towards maintaining their by-law, or at least to shew some interest in the matter, for the sake of the holders of their debentures.

Independently of the provisions in the statute 13 & 14 Vic. ch. 132, sec. 38, which requires the assent of a majority of the assessed inhabitants of the municipality, both to the taking stock and the amount to be taken, which seems to have been in fact wanting in this case, though it is alleged in the by-law—it is clear that the statute 12 Vic. ch. 81, sec. 177, has not been complied with in passing this by-law, for it does not make that special provision for securing the re-payment of the money that may be borrowed under it which that act requires. It is shewn that the whole assessed property of the township of Gloucester did not then exceed 27,000*l.* in value, and a half-penny in the pound upon that amount, would be wholly inadequate for securing the interest and liquidation of the principle of such a loan as 5000*l.*; it would not pay a fifth part of the interest. It is true that we cannot tell how small a part of the authorized loan might be taken up under it in the first year, or within any given period; but the by-law enables the Council to borrow the money to pay such calls as may be made, and these calls may be made in such a manner as to require a large advance of money within a short time, while the rate imposed would give no adequate security to the holders of any debentures which they might issue.

The 177th clause referred to, provides that no such by-law as this is shall be valid or effectual to bind the cor-

poration ; and that being so, the sooner its invalidity is declared and made publicly known the better, that no mischief may be done under it which can now be prevented.

Rule absolute with costs.

JACOBS V. ROBB ET AL.

Trespass—Fi. fa. set aside—Sale under—Liability of plaintiff for acts of Sheriff.

A. gave to B. a cognovit, with an agreement that judgment was to be entered immediately, but no execution to issue, except in certain events. On the 8th of November, B. put a *fi. fa.* into the sheriff's hands, and on the 18th A.'s goods were seized at his store, at St. Thomas, but he was allowed to retain them on giving security to the sheriff. After the seizure A. obtained a summons to set aside the *fi. fa.* for breach of faith, which was enlarged at B.'s request. On the 13th of January, while the application was pending, B's attorney telegraphed to his agent at London not to let the sheriff close A's store. The sheriff then requested instructions from the agent what to do, but received none ; afterwards this agent told him of reports that A. was selling the property, &c., and suggested a sale—and the sheriff accordingly sold a portion of the goods on the 16th and 17th of January. On the 17th the sheriff received orders not to proceed, and immediately stopped the sale ; he had no notice of the summons—which was made absolute on the 22nd of January.

Held, that the *fi. fa.* having been set aside, as obtained by B. on a judgment entered contrary to good faith, B. was liable to A. in an action of trespass, for all damages sustained from the sale as well as the seizure.

Trespass *quare clausum fregit*, for disturbing the plaintiff in his business, seizing his goods, and converting them to the defendants' use.

Pleas—1st. Not guilty. 2nd. The defendant in a plea to each count justified the seizure under a *fi. fa.* from the Queen's Bench against the plaintiff, issued on a judgment in favour of these defendants.

The plaintiff replied, that after the issuing of the *fi. fa.*, and before the commencement of this suit—to wit, in Michaelmas Term, 15 Vic.—it was ordered by the Court of Queen's Bench that the said writ, and all proceedings had thereon, should be set aside ; and that the same was set aside, as having been issued contrary to good faith, and in violation of an agreement between the plaintiffs and the defendant in that suit.

The defendants rejoined, traversing that the *fi. fa.* was set aside, as in the pleas mentioned.

The judgment on which the *fi. fa.* issued was entered on a cognovit given by Jacobs on the 27th of October, 1851, for

220*l.* 14*s.* 6*d.*, on which day it was agreed in writing between the parties to the following effect:—No execution was to issue upon the judgment (which was to be entered forthwith on the cognovit) until the 1st of March next, unless Jacobs should fail to pay 60*l.* 14*s.* 6*d.* by the 27th of November, or unless proceedings should be commenced against him by any of his other creditors, or any steps be taken by him or them to prejudice the claim of the now defendants (plaintiffs in that action), or to defeat their priority; and that for the purchase (of goods) made on that day by Jacobs,—about 70*l.* which formed part of the debt confessed—he was to have the usual credit, except in either of the above events, upon which, if they or either of them should happen, execution was to issue for the whole amount.

On the 8th November, 1851, these defendants put their *fi. fa.* against Jacobs's goods into the hands of the sheriff of the county of Middlesex, indorsed to levy 155*l.* and interest, with fees, &c. Jacobs, complaining of this as a breach of the understanding on which he gave the cognovit, applied through his attorney at Toronto to a judge in chambers to set aside the writ, and all proceedings under it. The sheriff's bailiff, on the 18th November, seized the goods in Jacobs's store at St. Thomas, and upon getting good security, he allowed them to remain, and, as it seemed, upon an understanding that Jacobs might go on and sell them provided he would apply the proceeds towards paying the debt.

The agent in the country of the plaintiffs' attorney, afterwards informed the sheriff that he was told that Jacobs was selling the goods at auction, and was about to remove them; and he suggested that the sheriff should have them sold. In consequence the sheriff did sell a portion of the goods on the 16th and 17th of January, to the amount of 52*l.*

The summons upon Jacobs's application to have the execution set aside, had been enlarged at the request of the plaintiffs in *fi. fa.*, and on the 22nd of January, 1852, a judge's order was made, on hearing the parties, setting aside the *fi. fa.* and all proceedings under it, on the ground that the plaintiffs had taken out the execution contrary to the agreement between them and Jacobs.

On the 13th of January, while that application was pending, the attorney for the plaintiffs in the *fi. fa.* (the now defendants) had requested their agent in London, Mr. Shanly, by telegraphic message, not to let the sheriff "close Jacobs's store." They were then apprehensive, it seems, that plaintiffs might get into difficulty by proceeding on the execution. The sheriff, on receiving notice of this, desired instructions from Mr. Shanly what he was to do, but received none. The sheriff received a message from the plaintiff's attorney on the 17th of January, that he was not to proceed, and that anything done by him would be at his peril. He did thereupon immediately stop the sale. So early as the 3rd of December, Jacobs's attorney had been informed by his agent in Toronto that a summons to stay proceedings had been enlarged till the following Saturday, and that all proceedings were to be stayed in the meantime.

There was no doubt that in seizing under the writ in November the sheriff was acting by the express direction of the plaintiffs, (the defendants in this action), and their attorney. His returning to the premises, and selling on the 16th of January, was in consequence of Mr. Shanly and he considering that it would be right to do so, upon the reports they had heard. The sheriff received no order to stay proceedings under the writ till the 16th or 17th of January, when he sent immediately to St. Thomas, and stopped the sale. The order of the judge did not come to him till ten days later, and nothing before that had been served upon him. It seemed that the sheriff—not feeling it safe to suspend proceedings on the notice previously given to him by Mr. Horton, who was Jacobs's attorney—referred to Mr. Shanly, who shewed him the telegraphic message he had received of the 13th January; but when the sheriff requested to know from him what he should do, declined giving him any instructions, saying that he had himself written to the plaintiff's attorney, but had received no answer. He said he would not direct or advise the sheriff in the matter, but that if he were in the sheriff's place he would go on and sell.

At the trial of this case, before Macaulay, C. J., at London,

the defendants gave no evidence ; and at the conclusion of the plaintiff's case they objected, that the sheriff, having notice given him by Mr. Shanly, on the 13th of January, before any sale of goods had taken place, not to proceed, by the telegraphic message of that date being shewn to him, was sufficient to exonerate these defendants ; and that if any more particular communication were necessary, it was incumbent on Jacobs himself to take the necessary steps to stay proceedings.

The learned judge, however, considered that the sheriff not being directed by these defendants or their attorney to forbear proceeding, the defendants were not relieved from responsibility ; and that the circumstance of the plaintiff, Jacobs, having omitted to serve a copy of the order, was only to be considered by the jury as matter in mitigation of damages ; that the execution having been set aside, these defendants were no longer in a situation to justify the seizure under the writ, nor the sale made in consequence of the seizure.

The plaintiff gave evidence that the goods sold by the sheriff for 52*l.* were in truth worth not less than 200*l.* The learned judge, as it might be found that these defendants were not answerable for the additional injury occasioned by the sale on the 16th of January, recommended to the jury to discriminate, if they could, between the damages occasioned by the seizure, and those occasioned by the subsequent sale ; and the jury found that the whole damage was 150*l.*, of which 25*l.* was the amount of injury arising from the seizure, and the stoppage occasioned in the plaintiff's business in consequence.

Read obtained a rule *nisi* to reduce the verdict to 25*l.*, pursuant to leave reserved, or for a new trial on the law and evidence, and for misdirection. He argued, 1st. That the action, should have been in case, not trespass—that trespass would be applicable if the writ were wholly void, but here it was only set aside for breach of faith—*Ewart v. Jones*, 14 M. & W. 774 ; *Scheibel v. Fairbairn*, 1 B. & P. 308 ; *Hartley v. Moxham*, 3 Q. B. 701. 2nd. That the sheriff, after making the seizure, abandoned it, and had

no right to sell without specific new instructions.—Cameron v. Lount, 4 U. C. R. 275; Gould v. White, 4 O.S. 125; Blades v. Arundale, 1 M. & S. 711, shew that the seizure was abandoned. He referred also to Wilson v. Tumman, 6 M. & G. 236; Davies v. Jenkins, 11 M. & W. 745; Page v. Wiple, 3 East. 314; Perkins v. Plympton, 7 Bing. 676.

Hagarty, Q. C., contra.—The defendants authorized the seizure and partial sale, which is the gist of the action—the rest is mere aggravation; they set the writ in motion and seized the goods, and are answerable for the entire consequences arising from their first illegal act.—Jones v. Williams, 8 M. & W. 349. The plaintiff was not bound to know the sheriff, or to enquire when he was notified, or what took place between him and the defendants. If he has done wrong, the defendants can sue him and get satisfaction for this verdict. As respects the duties of parties in notifying the sheriff, see McIntosh v. Stephens, 8 U. C. R. 530, 535. As to the sheriff's duties, where writ countermanded, see Hooper v. Lane, 12 Jur. 699; Walker v. Hunter, 9 Jur. 1079; Tebutt v. Holt, 1 Car. & Kir. 280.

ROBINSON, C. J.—In Baker v. St. Quintin (12 M. & W. 450), the court say, “it is the plaintiff who is the party to give the sheriff notice to do, or not to do anything.” It was the plaintiffs in the *fi. fa.*, the now defendants, who in this case (as in other cases of execution) set the sheriff in motion; and if it became material for their own protection afterwards that the debtor, Jacobs, should be no longer molested under the writ, they should have taken care that the sheriff got the necessary orders. The question, however, is not whether the sheriff had not rendered himself liable to an action at the suit of Jacobs, for anything done by him after he had knowledge of the summons having issued with a stay of proceedings. We are to consider that by the order which was ultimately made, the execution was set aside, and can no longer be made use of as a justification for the acts of these defendants, who sued it out.

Then, what is there to protect them against whatever injury the debtor, Jacobs, has suffered in consequence? **L**

do not think that the case of *Ewart v. Jones*, cited by Mr. Read, applies under the circumstances of this case so as to shew that trespass will not lie, but only on an action on the case; because the illegality here was that the execution was taken out before the plaintiffs had a right to it by their own agreement, and from the conditions on which they obtained their judgment.

Then the plaintiffs in that writ, who are now defendants in this action, were bound at their peril, when they found their conduct complained of as illegal, to take all possible care that the damage to Jacobs in consequence of their illegal act did not continue. They could not safely rely upon what Jacobs might do for his own relief, for he was at liberty to be passive, and to hold the now defendants responsible to him; they acted at their peril. The case of *Perkins v. Plympton* (7 Bing. 676), indeed, decides this case, and shews that the verdict was proper. In *Page v. Wible* (3 E. R. 314), and *Scheibel v. Fairbairn* (1 B. & P. 388), the actions were not trespass, but in case grounded on an omission of a supposed duty, which duty the court did not consider was incumbent on the party sued, and therefore they held those actions would not lie.

The damages in this case may be high, and I fear they are; but the evidence, if believed, supports the verdict in that respect. The sum made under the writ, 40*l.* and upwards, exclusive of sheriff's fees, if it has been paid over to these defendants on account of their execution, has discharged so much of the plaintiff's debts; and if he has had the benefit of it in that way as a payment, it should of course be allowed for in estimating the damage which he suffered by the illegal sale of goods. How this was arranged does not appear to us, but we assume that the jury have made allowance for this sum, if it has been paid over, or is still in the sheriff's hands.

DRAPER, J., and BURNS, J., concurred.

Rule discharged.

SMITH V. THE MUNICIPAL COUNCIL OF THE UNITED
COUNTIES OF PRESCOTT AND RUSSELL.

Counties of Prescott and Russell—Rate imposed for erection of registry office.

The Municipal Council of Prescott and Russell passed a by-law to raise a sum of money for building a registry office in the County of Russell; and they enacted that the rate should be levied only on the townships composing that county. This by-law was quashed, on the ground that as the office when built would continue the property of the United Counties until a separation should take place, the expense of erecting it must be borne by both counties in common.

Richards obtained a rule *nisi* to set aside by-law No. 34, passed by the Municipal Council of the United Counties of Prescott and Russell, or so much of it as enacts that 50% shall be rated, levied, assessed, and collected in the several townships of the County of Russell; and that the sum set opposite to each of the townships therein mentioned shall be rated, levied, and collected in each of such townships, respectively, being the portion of the said sum of 50%, which it is declared in the said by-law shall be levied in each of the said townships respectively; and also, so much of the said by-law as enacts that the sums stated in the said by-law shall be paid into the hands of the county treasurer; or so much of the by-law as the court shall consider illegal.

1st, On the ground that the Council had not the power to assess the county of Russell alone, or the townships in that county alone, for the purposes mentioned in the by-law, but should have assessed the united counties, or all the townships in the united counties.

The by-law was intituled, "By-law to levy an assessment upon the county of Russell, for building a Registry Office in and for the County of Russell." It recited that it was expedient to raise 50% for building a fire-proof office for the safe-keeping of all books, records, and other papers belonging to the office of registrar of the county of Russell; and that the same should be assessed upon the real and personal property liable to assessment in the said county: and it enacted, that 50% should be rated on and collected in the several townships of the county of Russell, upon all real and personal property liable to assessment: and that the sum set opposite to each of the townships therein mentioned

should be rated, levied, assessed, and collected in each of the said townships respectively, being the portion of the said 50*l.* which should be levied in each of the said townships respectively—viz., Cumberland 17*l.* Clarence 11*l.* 15*s.*, Russell 12*l.* 15*s.*, Cambridge 8*l.* 10*s.*—to be paid into the hands of the county treasurer for the purpose aforesaid. It then made provision for the erecting of the building on a site to be procured.

This by-law was passed on the 5th of May, 1852.

No cause was shewn against the rule. The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

In assessing distinct portions of the 50*l.* upon the several townships, the council have followed the provisions of the Assessment Act 13 & 14 Vic., ch. 67, sec. 31; and, as nothing appears to the contrary we must assume that, in fixing the amount for each township, they observed the directions of the Assessment Amending Act, 14 & 15 Vic. ch. 110. sec. 6.

The objection taken to the by-law is, that the burthen should not have been confined to the county of Russell, but that the inhabitants of the county of Prescott, which is in union with it, should equally have been assessed, for that it was contrary to law to throw the expense of building the registry office upon the county of Russell alone. It is a small matter to raise a question about; and as the building in question will no doubt become ultimately the exclusive property of the county of Russell, in which it is to be built, the Municipal Council took what seems at least a reasonable and just course in providing that it should be put up at the expense of that county: but the inhabitants of Russell have a right to raise the question whether the law allows that to be done.

The new registry act 9 Vic. ch. 34, sec. 19, enacts, that if any county registrar shall neglect to provide a fireproof office and vault within eighteen months, *the district council* shall cause a proper and sufficient office to be provided *at the expense of the district*. This was while the territorial division of the province into districts continued.

By the 34th clause of the same act it is provided, that it shall not be necessary to appoint a registrar for each of the counties of Prescott and Russell, but that one registrar may discharge the duties for both counties: and that in the event of a vacancy in the office of the registrar of either of the said united counties, the Governor General may, in his discretion, appoint a registrar for each county respectively.

The statute 12 Vic., ch. 81, sec. 41, sub-sec. 22, gives authority to the municipal councils appointed for counties under that act to raise such moneys as may be required for any public work, by a rate to be assessed equally on the whole rateable property of such county respectively, according to the assessment laws which may be then in force.

The statute passed in the same year, 12 Vic., ch. 78, which abolished the division of Upper Canada into districts, and made each county a separate jurisdiction, provides that these two counties of Prescott and Russell shall nevertheless remain united for all purposes except representation and the registration of titles; and enacts (section 6), that the county property of the united counties, shall so long as such counties remain united, be the common property of such united counties, in whichever of such counties the same may be situated. And it provides in another clause (19th), that upon the disuniting of any junior county (which is the expression used in the statute) from the union, there shall be a separate registry of titles for such county, as for other counties generally in Upper Canada: and further (section 20), that in such case the public property of such union, lying within the limits of such junior county, shall *ipso facto* become the sole property of, and become vested in such junior county.

We then find that by the General Assessment Act 13 & 14 Vic., ch. 67, section 6, it provides that all taxes shall in future be levied upon the whole taxable real and personal property of the locality to be taxed, in proportion to the assessed value thereof; and that whenever a sum is to be levied for county purposes, the municipal council shall direct, by their by-law, what portions of such sum shall be levied in each township or incorporated town or village in.

the county; and by the amending act 14 & 15 Vic., ch. 110, section 6, it is directed that, in apportioning any county rate among the different townships, as provided by the clause I have mentioned, the amount of property returned in the assessment roll for the year next before shall be made the basis upon which such apportionment shall be made.

These seem to be all the provisions bearing materially upon the question before us, though we can feel little confidence that, in the immense multitude of provisions upon these subjects scattered through the different acts, there may not be some other enactment which should be taken into account. We find the councils themselves so frequently overlooking some material provision, which it was doubtless not their intention to disregard, that we cannot feel perfectly certain that something may not have escaped our attention in this case which is necessary to be considered; but having looked at whatever has been cited, and at what we have found in looking over the several acts, it appears to us that, in the present condition of things, as regards these united counties of Prescott and Russell, the registry office, which it is proposed by the council to build, will, when built, be the property not of the county of Russell alone, but of the united counties, and will continue so until those counties are disunited; and we are not informed that any movement towards a separation has yet been made. That being so, the expense of the building is a burthen that must be borne by the two counties in common; and, though the council had clearly a discretion to apportion to these four townships a share of the burthen, yet they could only do so by adopting as the basis of their calculation the amount of rateable property throughout the two counties, for they have no power to exempt any township from contributing.

We consider that it was beyond the power of the Municipal Council to impose a tax upon the inhabitants of the townships in the county of Russell exclusively, for building the registry office in question, and therefore that the by-law must be quashed, and of course with costs.

By-law quashed

FRAZER, REGISTRAR OF THE COUNTY OF GLENGARY, V.
THE MUNICIPAL COUNCIL OF THE UNITED COUNTIES OF
STORMONT, DUNDAS, AND GLENGARY.

Registry office, removal of—Affidavit.

The powers with respect to the removal of registry offices, given to the District Councils by 9 Vic. ch. 34, sec. 19, are now vested in Municipal Councils for counties.

An affidavit in support of a motion to quash a by-law is sufficient, though not entitled in any court.

Brough, last term, obtained a rule to shew cause why the by-law of the council, passed on the 30th of January, 1852, intituled "A by-law to authorize the removal of the registry office in and for the county of Glengary, from the village of Williamstown to the village of Alexandria," in the said United Counties, should not be quashed.

The by-law moved against provided that the registry office for the county of Glengary be removed from the village of Williamstown, where the same was then held, to some convenient and proper building in the village of Alexandria, but not until a proper building should be provided, at which time the office should be so removed, and all the duties performed at Alexandria. It also appointed certain commissioners for erecting a proper office in Alexandria.

The registrar, Mr. Frazer, the present applicant, was appointed on the 30th January, 1839, by the lieutenant governor, Sir Francis Bond Head, by commission under his seal of office, in which commission the lieutenant governor appointed Williamstown, in the county of Glengary, as the place where the office should be kept, under the statute then in force.

In this term, *Vankoughnet*, Q.C., shewed cause.

Cameron, Q. C., supported the rule.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The question is, whether, under the 19th section of the Registry Act (9 Vic. ch. 34), the county council could legally pass this by-law, because the registrar had provided no fire-proof vault (which, however, is not shewn); and whether, under 12 Vic. ch. 81, the county council may do what the district council could have done. The 19th clause of 9

Victoria, ch. 34, is to this effect—that proper fire-proof offices shall be provided within eighteen months after the passing of the act in every county in the province, for the keeping of all books and records belonging to the office of registrar; and in case the registrar of any county shall neglect to provide such office and vault within the eighteen months the district council shall fix upon the most eligible site for such office within the county, and cause a proper and sufficient office to be provided there at the expense of the district. The fourth clause of the same act provides that the registrar appointed for any county “shall keep an office in the same at the place named in his commission, or at such other place as may be appointed by proclamation, according to the provision of this act;” and by the 30th clause it is enacted, “that whenever it shall appear to the satisfaction of the governor of the province that the registrar’s office for any county is situated inconveniently for the public, it shall be lawful for him by proclamation to order the said office to be removed to such other place in the county as he shall deem expedient.”

It sufficiently appears to us that Mr. Fraser, the applicant, is registrar for the county, and he must in that capacity necessarily have an interest in the subject matter of this by-law, so as to enable him to move. Mr. Fraser’s own affidavit does not seem to us therefore to be indispensable to the support of the application; and if it were, still, though it should properly have been entitled as in this court, yet according to the practice it may be held sufficient, as it appears by the *jurat* to have been sworn before a commissioner of this court, and is not in any cause pending.

It seems to be assumed by the registrar, that inasmuch as his commission—given to him in 1839—appoints that the office shall be held at Williamstown, it is therefore irrevocably fixed there. That, however, is clearly not so. But the question is, whether the municipal councils of these united counties have power to remove it. This council now represents what was formerly the Eastern district, and with some small change of territory, I believe, their power of legislation extends over the same locality for which the

Eastern district council had authority to pass by-laws in 1846, when the Registry Act, 9 Victoria, chapter 34, was passed. Then, if that district council were still in existence, under the former act of 4 & 5 Victoria, chapter 10, they could, under the 9th Victoria, chapter 34, section 19, remove the site of the registry office to any place they might have thought most eligible within the county of Glengary, provided the registrar had not within eighteen months after the passing of the statute provided a suitable fire-proof building for the office.

If the present Municipal Council of the United Counties had now the same power over this subject that the District Council would have had if it were still in existence, then we think the by-law which has been passed is sufficient for the purpose of removing the site, for we are not to assume, in the absence of any proof to that effect, or even of any assertion on oath before us, that there was a proper fire-proof building erected by the registrar within the eighteen months before the by-law was passed. In support of the by law, we should rather assume that there was not, since it is a recognized principle in dealing with these by-laws that they need not shew on the face of them all that must have existed in order to make them valid. We will assume that this was passed under such circumstances as warranted it, until the contrary is shewn, when neither the by-law itself nor the general law of the land shew it to be a bad by-law.

Then the only question seems to be, whether the present Municipal Council for the united counties has authority to do what the District Council could have done, as regards changing the site for the registry office. It is denied that they have, and that appears to be the only ground on which the validity of the by-law is disputed.

The Municipal Act, 12 Victoria, chapter 81, section 41, in defining for what purposes county by-laws may be passed, does not specify any object to which this by-law seems to be applicable by a fair construction. The 175th section does declare that the municipal councils of counties shall be substituted for the district councils; but the chief, if not

the only object of that clause is, to remove all doubts as to the new council being liable to all the obligations of the district council, and capable, on the other hand, of enforcing all obligations contracted with the former district council; but I think, by a reasonable construction, it has the further effect of putting the one in place of the other, as to any matter of the description now before us, unless we can see in some other provision proof that it was not intended.

The statute 12 Victoria, chapter 78, in the third clause, provides that all laws then in force applicable to *districts*, or the courts, *offices*, or other institutions thereof, shall be applied to and have the same operation and effect upon the *counties*, and their respective courts, offices, and institutions. It seems to be no strained construction of this enactment to hold, that the power which the district before had, through its council, under the 9th Victoria, chapter 34, section 19, to remove the registry office under certain circumstances to a more convenient site, can now be exercised by the counties through the county council. I think the legislature undoubtedly intended this, and that there is nothing in the 8th section of this same act (12 Vic. ch. 78) that can affect this question.

It is my opinion, therefore, that the by-law moved against is not invalid.

This rule does not apply to the by-law passed on the same day for paying the expenses of the building. That is not moved against, and no question upon it is before us.

DRAPER, J.—I am not clear on the point, but on the best consideration I concur in discharging the rule.

BURNS, J., concurred.

Per Cur.—Rule discharged.

THE EARL OF ELGIN V. SLAWSON AND HORNER EXECUTORS
OF WILLIAM SWARTZ, DECEASED.

Plea, ne unques executors—Verdict against one—Evidence.

On a plea of *ne unques executors* by two, the plaintiff may have a verdict against one only.

Held, that the evidence given in this case, stated below, was sufficient to prove executorship as against one, if not against both defendants.

This was an action of debt on bond, against the executors

of William Swartz, co-surety with Crosby, the suit against whom on the same bond is reported, ante page 256.

Among other pleas the defendants pleaded that they never were executors of Swartz, as alleged.

At the trial, before DRAPER, J., at Woodstock, notice to produce the probate of Swartz's will was admitted, and the defendant Slawson was called as a witness for the plaintiff. He swore that he had not got the probate; that he thought it was two years after Swartz's death (which took place 17th April, 1848) before he knew of this bond, and that since that knowledge he had no assets; that the assets of Swartz's estate amounted to 80*l.*, and they had paid a debt of 14*l.* 5*s.*; that the principal part of Swartz's goods were bequeathed to his widow, who paid part of the 14*l.* 5*s.*: that the effects of Swartz were left in the hands of his family after his death; and that the defendant Horner helped to take the inventory. The judge of the Surrogate Court for the County of Oxford was also called and swore that Swartz's will was proved before him on the 11th October, 1848, and that he ordered the probate to be granted, and that it was granted; and that the defendant Slawson proved the will.

The defendant's counsel objected that it was necessary to prove that Horner as well as Slawson were executors of Swartz; that the evidence given afforded no legal proof against either—at all events, none as against Horner; and on this latter objection—the want of proof against the *two*—the plaintiff was non-suited.

In Easter Term *Leith* obtained a rule *nisi* to set aside the nonsuit, to which *D. G. Miller* shewed cause in this term, contending principally, that admitting the nonsuit could not be sustained on the ground that there was no evidence that both defendants were executors, yet that the first objection should prevail, as the proof given was legally insufficient to establish that either of the defendants were executors of Swartz. He cited *Dale v. Eyre et al.* 1 Wills. 306.

Leith contra, cited *Parsons v. Hancock, et al.*, M & M. 330; *Griffith v. Franklin, et al.*, *Ib.* 146; *Cousins v. Paddon*, 2 Cr. M. & R. 558; *Creswick v. Woodhead*, 4 M. & G. 811.

DRAPER, J., delivered the judgment of the court.

At the trial, I was of opinion with the defendant on the first of these objections, and took no notice of the other. My attention was not drawn to any decision on the point by the plaintiff's counsel, and I treated it as the case of an action against two defendants, founded on contract in which the contract must be proved against both.

I am quite satisfied that this was not correct; that in fact the rule has no application to such an issue—for, as Maule, J., observes, in *Atkins v. Humphrey* (2 C. B. 654),—"The plea is addressed not to the promise," (or debt, as in this case), "but to the allegation at the commencement of the declaration—that the defendants and each of them were executors; that allegation is devisable, the matter of the plea being matter of personal exemption only." I refer also to 1 Williams' *Saunders*, 207.

As to the objection that there was no evidence that either of the defendants were executors: The evidence was given by the judge of the Surrogate Court, who swore that Swartz's will was proved before him, and probate granted on it; that he, as Surrogate, ordered the probate to be granted. The defendant Slawson was sworn before the Surrogate as to the death of Swartz, and that he was one of the persons named in Swartz's will as an executor. The Surrogate further said, that it appeared by the papers filed in the Surrogate office, (which were produced by the Registrar on a *subp. duc. tec.*) that only one executor proved the will and took the oath. The objection taken was, that this was not secondary evidence of the contents of the probate, but only proof of the order that had been given for the issue of the probate; that the plaintiff might, and ought to have obtained an exemplification. But the evidence given by Slawson himself established that he had acted as executor; and that, at least as far as taking the inventory was concerned, Horner acted with him; and Slawson spoke throughout as if he was not acting alone—that "we paid a debt"—"we never took away Swartz's effects"—virtually admitting himself to have been executor, and going far to prove Horner to

have acted in that capacity ; for proof that the defendant has intermeddled with the property, so as to make himself executor *de son tort*, is sufficient proof of his being executor ; for if he has acted as executor he may be sued as executor, whether he has proved the will or not. At the trial, certainly the plaintiff gave all his proof with the view of making out the probate ; but looking at the evidence, and admitting that he wholly failed in proving any probate there was sufficient evidence against one, if not against both defendants—the nonsuit therefore was wrong.

But, looking at the record, and the whole evidence which is the same as in the case of the Earl of Elgin v. Crosby, as to the general merits—the plaintiff clearly could only recover nominal damages, and therefore it would be useless to grant a new trial if the defendant will consent to the nonsuit being set aside, and a verdict for nominal damages entered

Rule accordingly. (a)

WILKES ET AL. V. McMILLAN.

Practice—Order not served—Effect of—Affidavit.

The affidavit for which a motion was made to rescind a judge's order stated that certain papers in the suit had not been served on the defendant ; but did not further shew his connection with the cause either as party or attorney ; *Semle* that the affidavit was bad.

Where an order is of such a nature that no one is prejudiced by delay in serving it, such delay is no ground for setting the order aside.

Wilkes moved to set aside, with costs, an order in this cause made by Burns, J., or the copy and service thereof.

1st. Because the order had been waived and abandoned by the defendant, not having been served for more than ten weeks after it was made. 2nd. Because it is not dated. 3rd. And on grounds stated in affidavit ;—or, that the order should be rescinded, because it was illegally granted.

On the 21st of June, 1852, Mr. Justice Burns made an order in chambers, on hearing the parties, that the writ of

²⁷ (a) See *Doe dem. Bassett v. Mew*, 7 A. & E. 240 ; *Cox v. Allingham Jac.* 514 ; *Gorton v. Dyson et al.*, 1 B. & B. 219 ; *Pinney v. Pinney*, 8 B. & C. 335 ; *Douglas v. Forrest*, 4 Bing. 704 ; *Atkins v. Tredgold*, 2 B. & C. 30.

replevin issued in this case be set aside with costs, for various irregularities.

On the 30th of August one of the plaintiffs was served with a copy of this order, and a notice of application the next day to tax costs.

It was sworn that until such service, nothing had been served on the defendant since the 11th of June, when he was served with a copy of the summons on which the order was afterwards made.

Joddrel v. ———, 4 Taunt. 252; Wilson v. Hunt, 1 Chy. 647; Charge v. Farhall 4 B. & C. 865; Edensor v. Hoffman, 2 Cr. & J. 140; Kenney v. Hutchinson, 6 M. & W. 134; Sandford v. Alcock, 10 M. & W. 689; Normanby v. Jones, 3 D. & L. 143; Doe dem. Harcourt v. Roe, 4 Taunt. 883; Solomon v. Nainby, 7 Dowl. 459, were cited in support of this rule.

Hagarty, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The application which is now made to rescind the judge's order setting aside the writ of replevin is founded on an affidavit made by Frederick Thomas Wilkes, Esquire, who does not state that he is either one of the plaintiffs, or is attorney for the plaintiffs; and he swears that no copy of the judge's order was served on him, or on his agent, since the 30th of August. He leaves it to be inferred from these papers being served upon him that he is recognized by the defendant as being the proper person to be served, and does not swear that he is either party or attorney in the cause, or shew that the other plaintiff or his attorney has not been served.

As to delay in serving the rule; if that were shewn quite clearly, we do not see that it supplies a ground for setting an order aside. When a party has obtained an order or rule, granting him time or other indulgence, he has in many cases been held to have lost the benefit of it by neglecting to take out and serve the rule or order, and the other party has been held to have a right to proceed as if it had been waived or abandoned; but when the order is of that nature that no party is prejudiced by the delay, the practice

not shew such delay to be a ground for setting aside the order (a).

The writ, we think, was properly set aside, for there were substantial defects in the affidavits.

Rule discharged with costs.

Ex-parte McINTYRE.

Clerk—Service under articles.

The applicant, in 1847, articleed himself to J. M., an attorney, then in partnership with E. J. In November, 1850, J. M. went to England and did not return; in February, 1852, his partnership with E. J. was dissolved. In March, 1852, the clerk articleed himself, of his own accord to T. G. for the residue of his five years—J. M. not being a party to, or consenting to this arrangement. The court would not allow the time served with the last master.

Neil Cameron McIntyre applied to be admitted as an attorney of this court. The facts of the case were as follows:

Mr. McIntyre had served with six masters. On the 6th of September, 1850, (his first articles being dated 6th of August, 1847,) Mr. Boulton, his fourth master, assigned his articles to J. W. Muttlebury, Esquire. Mr. Muttlebury was then in partnership with Mr. Edward Jones, and so continued until the 1st of February, 1852. In November, 1850, Mr. Muttlebury went to England, and continued there until the time of this application. It was sworn by another clerk, in the office of Messrs. Jones & Muttlebury, that Mr. McIntyre served faithfully in the office from the 6th of September, 1850, to the 1st of February, 1852.

The partnership with Mr. Jones being then at an end, Mr. McIntyre, of his own accord, on the 1st of March, 1852, articleed himself to Mr. Galt for five months and twenty-six days, to make up his five years' service—Mr. Muttlebury being no party to that assignment, nor, it appeared, concurring in it, nor privy to it; and their having been no previous application to the court to order or authorize the assignment—The questions were,

1st, Whether the whole, or how much of the service

(a) See *Gurney v. Gurney*, 15 L. J. (Q. B.) 265; 3 D. & L. 734, S. C.

from the sixth of September, 1850, to the first of February, 1852, could be allowed as a service under the articles to Muttlebury.

2ndly. Whether the articles and service with Mr. Galt could be taken into account.

ROBINSON, C. J., delivered the judgment of the court.

Mr. McIntyre relies on his service with Mr. Muttlebury's partner, during his absence, as a service under his articles to Muttlebury; he cannot therefore claim to have Mr. Muttlebury regarded as having "discontinued practice;" for on that view all that service must go for nothing—as I fear, in strictness, it should. But there is nothing shewn to us which can warrant our considering Mr. Muttlebury as having discontinued practice in March, 1852—when, without any assignment from him, or any assent of his, Mr. McIntyre artieled himself to Mr. Galt—any more than in the month of February, up to which time he desires his service with Mr. Muttlebury to be allowed.

He should have obtained an assignment from Mr. Muttlebury, or have had those articles cancelled, or procured Mr. Muttlebury's written assent to his entering into new articles, or moved this court to discharge him from his former articles. When he artieled himself to Mr. Galt, in March last, he was not *sui juris*, being under articles to Mr. Muttlebury, from which he was in no manner released. The court would be taking too great a liberty with the statute to allow that time as a service under the circumstances (a).

LADD V. BULLEN (b).

Agreement—Construction.

The plaintiff agreed to do certain work for the defendant, to be approved of by one D. B. It was provided that, in case of D. B's absence, any other person might be appointed in his place by the plaintiff and defendant.

Held, that the defendant might dispense with such appointment and accept the work himself.

COVENANT. The declaration stated, in substance, that by certain articles of agreement made between the plaintiff and defendant, in consideration that the plaintiff thereby

(a) See *Ex parte Rowle*, 2 Chy. 61. 1 Chy. 558, *note*.

(b) Decided in Hilary Term last.

bound himself to build a house for the defendant, in every respect to the satisfaction of one D. B. therein named, according to the plans then in the hands of the defendant, and signed by the plaintiff and defendant, and would complete and finish the whole in conformity with the aforesaid plan, &c., the defendant thereby promised and agreed to and with the plaintiff to pay him rates and prices *therein mentioned and specified*, provided that the said work should be progressing satisfactorily—that is to say, &c., (setting out the times and manner of payment)—subject, nevertheless, to the following conditions:— * * *Seventhly*, “That if the said D. B. should leave the township (meaning the township of Delaware) any other person or persons might be appointed in his place for the purposes before mentioned, by the plaintiff and defendant.” A schedule of prices, and estimate of the work above referred to, was set out in the declaration, and stated to have been annexed to, and to form part of the agreement. The plaintiff then averred that he commenced the work in pursuance of the agreement, and did construct, complete and finish them in every respect *to the satisfaction of the said defendant*, in strict conformity to the terms of the said agreement and plans, &c., and in a good, substantial *workmanlike manner* : that from the time of commencement until completion, he caused the said work to progress *to the satisfaction of the defendant*, and that the said work was completed *to the satisfaction of the defendant* ; that after the commencement of the work the said D. B. left the township of Delaware, and remained away from thence until afterwards—to wit, on, &c., the defendant, of his own free will, *dispensed with so much of the said agreement by which the said work was required to progress and to be done to the satisfaction of the said D. B. or any other person ; and with his approval thereof, and his return that the said work was done to his satisfaction ;* and the defendant did then receive and accept the work so done without requiring the sanction or approval of the said D. B.—Breach, non-payment of the prices agreed upon.

Special demurrer—The objections relied on sufficiently appear in the judgment

Connor, Q. C., for the demurrer. *Eccles*, contra.

Moore v. Earl of Plymouth, 3 B. & Al. 69; Smith v. Brandum, 2 M. & G. 248; Ross v. Parker, 1 B. & C 358; were referred to.

ROBINSON, C. J., delivered the judgment of the court.

The first two causes of demurrer assigned are clearly not tenable, nor the third. The specifications and plans referred to as they are in the agreement, are to be read as forming part of it; and it is clear enough what the plaintiff means when he speaks of the rates and prices "therein mentioned and specified." We do not see that we can pronounce the specifications unintelligible. We must suppose that the defendant, who signed them, admitted them to be sufficiently specific for his purpose, though the terms are set down with less formality than they would probably be in a well-drawn legal instrument.

All that requires consideration is the exception urged on account of the plaintiff not averring (as he was not able to aver) that Brown had approved of the work, nor shewing that any persons had been appointed by himself and the defendant to report upon the work instead of Brown, who had left the country. The agreement provides for this being done in case of Brown's absence; and the questions are whether such appointment of two persons to inspect the work and their approval of it, forms a condition precedent, going to the whole cause of action; and if so, then whether this is not rendered immaterial by the allegation of the defendant declining to nominate any person, or at least dispensing with it, which is the same in effect, and accepting the work himself and approving of it as sufficient. The case of Dallman v. King (4 Bing. N. C. 105) certainly supports this declaration strongly in principle, for we should not be warranted in assuming that there was any more particular reason than appears, for requiring Brown's approval. I mean, that we are not to conjecture that he had an interest independent of the defendant in having the work well done; and, indeed, if he had, still the contingency of his being absent is provided for in the agreement, and his approval was clearly no longer necessary. Then there is quite as much

reason in this case as in *Dallman v. King*, for saying that the substantial part of the condition is, that the work shall be done in a workmanlike manner, as the agreement requires; and that is averred here. And this case is much stronger than that of *Dallman v. King*, inasmuch as the declaration here states that the defendant waived the calling in any one else to examine and approve, and that he accepted the work as sufficient. He surely could judge for himself, if he pleased, and could do that for himself which he had merely reserved the privilege of calling another to do for him.

It is besides true, as was argued for the plaintiff, that part of the price to be paid was independent of any final report or approval by other parties, for it was to be paid as the work progressed, and if it progressed satisfactorily; though perhaps the intention was, that it was Brown who was to be satisfied with the work as it progressed, as well as at the the conclusion of it. The case of *Smith v. Wilson* (8 East. 437) turned on the peculiar nature of the claim for freight, which is dependent on the actual accomplishment of the voyage. When the language of the court in that judgment is attended to, it will be found to have a strong tendency to support this declaration. I refer also to *Holtham v. East India Company* (1 T. R. 638), *Worsley v. Wood* (6 T. R. 722), *Jones v. Barkley* (Dougl. 694).

TENNERY V. BURNHAM.

Landlord and tenant—Estoppel.

A. conveyed certain land to B., who conveyed to C., but remained in possession, professing to hold as C.'s tenant. C. conveyed to the plaintiff.

The defendant claimed under a purchase at sheriff's sale, on an execution against A., and to be in possession through B. as his tenant; and he offered to prove that, having commenced an action of ejectment against B., the latter had agreed to become his tenant; and that the transaction between A. B. and C. were fraudulent, the property remaining in A.: which evidence having been rejected, on the ground that the defendant could not rely upon B.'s possession, inasmuch as he was tenant to C., and had submitted to distress for rent at his instance, the court granted a new trial.

Ejectment for one hundred and twelve acres of land, of the centre part of lot 26, in the 2nd concession of Darlington.

At the trial, before Sullivan, J., at Cobourg, a perfect

chain of title to the land was not shewn. It was proved that one David Wright occupied it about six years ago; and after him one Lyman Jacobs, who made a deed of bargain and sale of the land to his son Lyman E. Jacobs; and on the 22nd of May, 1850, Lyman E. Jacobs made a deed of the land to Benjamin Jacobs, his uncle, but continued in possession himself as before, stating that he was occupying as tenant to Benjamin Jacobs. On the 24th of June, 1851, Benjamin Jacobs conveyed the land to the plaintiff Tennery. It was proved that in February, 1851, Lyman Jacobs was in possession, and not his son, although his deed to his son had been made in December, 1849.

The defendant claimed under an attachment, and also to be in possession of the premises through Lyman E. Jacobs as his tenant, and he offered to prove that having commenced an action of ejectment against Lyman E. Jacobs, the latter agreed to become his tenant; but it was objected, on the part of the plaintiff, that Lyman E. Jacobs, having conveyed the land to Benjamin Jacobs, and having continued in possession afterwards, must be looked upon as tenant at sufferance to his vendee, Benjamin Jacobs; and, having admitted himself to be holding under him as tenant, and having besides, as was proved, submitted, in December, 1850, to a distress at the instance of Benjamin Jacobs for 25*l*., as being due to him for six months' rent, it followed that, as between Benjamin and his privies in estate and Lyman E. Jacobs, there could be no impediment offered to Benjamin Jacobs recovering possession, by any one claiming to avail himself of a possession held by Lyman E. Jacobs, the tenant of Benjamin; and on that ground the learned judge rejected the evidence offered by the defendant, and directed a verdict for the plaintiff.

The counsel for the defendant contended, on the other hand, that the evidence shewed the transaction between Lyman Jacobs, Lyman E. Jacobs, and Benjamin Jacobs, to be colourable and fraudulent, and the alleged tenancy of Lyman E. Jacobs under Benjamin a mere pretence to support appearances and defeat the claim of Lyman Jacobs's creditors; that it was competent to the defendant to shew

that Lyman E. Jacobs was no tenant in fact of Benjamin but merely holding for the father, who had fraudulently assigned to him ; that if the fact were so, there was not the confidence of landlord and tenant as between Lyman E. Jacobs and Benjamin, and consequently the defendant was at liberty to compromise his suit against Lyman E. Jacobs by accepting the latter as his tenant, and could now hold him or his assignee bound by that acknowledgment of the defendant's title.

A verdict was given for the plaintiff.

Vankoughnet, Q. C., moved for a new trial on the law and evidence, and for misdirection : he cited *Down v. Thompson*, 9 Q. B. 1037 ; *Hall v. Butler*, 10 A. & E. 204 ; *Cornish v. Searell*, 8 B. & C. 471 ; *Gravenor v. Woodhouse*, 1 Bing. 38 ; *Hopcraft v. Keys*, 9 Bing. 617 ; *Rogers v. Pitcher*, 6 Taunt. 202.

Cameron, Q. C., shewed cause. He cited *Tay. Ev.* 88, and the cases there collected—*Doe dem. Johnson v. Baytup*, 3 A. & E. 188 ; *Doe dem. Willis v. Birchmore*, 9 A. & E. 662 ; *Doe dem. Bullen v. Mills*, 2 A. E. 17 ; *Dolby v. Iles*, 11 A. & E. 335.

ROBINSON, C. J., delivered the judgment of the court.

We think this rule should be made absolute. Burnham claimed under a judgment of execution, and purchase at sheriff's sale. He was the plaintiff in the suit against Lyman Jacobs, the father, the debtor in the *fi. fa.*, and was ready, if he had been allowed, to shew at the trial that he stood in this position, and that he was therefore entitled to contend against the assignment by the debtor to his son as fraudulent. But he was looked upon as estopped from disputing the chain of title derived from Lyman Jacobs, because the son, Lyman E. Jacobs, who was in possession, had declared at one time that he was tenant of Benjamin, to whom he had assigned after taking the deed from his father which this defendant alleges to have been fraudulent. The defendant urges that the whole was a fraud ; that the property in fact continued the property of the debtor, till it was sold on his judgment.

I cannot see how he can be held to be estopped from

shewing this. No doubt, if Lyman E. Jacobs had proved himself to the satisfaction of the jury to be the *bona fide* tenant of Benjamin Jacobs, which is what is pretended, the defendant would not be suffered to gain any advantage to himself by inveigling him into a betrayal of the confidence placed in him by his landlord; but after reading the evidence in this case, and in the case of Jacobs v. Jacobs, tried at the same assizes, not a doubt can remain that the alleged tenancy between Lyman E. Jacobs and Benjamin was altogether a pretence. It would be turning the doctrine of estoppel to the purposes of fraud and not of justice, if we were to hold ourselves bound to preclude all inquiry into the honesty of the transaction, and the reality of the alleged tenancy. Tenny, the plaintiff, can of course stand in no better situation than Benjamin would have stood in if he had not assigned to him; and if it be really true that the titles pretended to be derived from Lyman Jacobs, which his judgment creditor Burnham was clearly in a condition to dispute, were mere fictitious, they could shew no such relation of landlord and tenant as should form the foundation for applying the principle relied on. The defendant was surely at liberty to dispute that Lyman E. Jacobs was holding for Benjamin at all, either as tenant or otherwise, and to shew that it was a mere fiction.

New trial, without costs.

MAGILL V. YOUNG ET AL.

*Assignment of lease by assignee of lessee—Not fraudulent in this case—
Deed of assignment sufficient to pass lease.*

The plaintiff, being lessee of T. S., of certain premises, assigned his term and all other property to the defendants for the benefit of his creditors. The defendants took possession in March, and remained until August, disposing of the plaintiff's stock so assigned; they then quitted the premises, having paid the rent up to November following. They requested the lessor to take the premises off their hands, but he refused. In January they assigned to one P. B., a pauper; the plaintiff knew nothing of this assignment; after the expiration of the term he was sued by the lessor, and compelled to pay two quarters' rent; for which and for his costs so incurred, he brought assumpsit against these defendants. *Held*, (the above facts having been submitted for the opinion of the court), that the assignment by the defendants could not be treated as fraudulent, and that the plaintiff could not recover. *Held*, also, that the interest in the lease passed to the defendants under the assignment, as set out below.

The declaration stated that the plaintiff, being the lessee of one Thomas Stinson, of certain premises, assigned to the defendants, subject to the payment of the rent reserved; that the defendants entered, and were possessed for the residue of the term so demised, "and thereupon the defendants undertook, and faithfully promised the plaintiff to pay all the rent that should become due under the said indenture of demise, for and during so much of the residue of the said term as they, the defendants, should remain possessed of the said demised premises, as such assignees as aforesaid." Breach—non-payment of two quarters' rent, which the lessor recovered in an action against this plaintiff, besides costs and charges.

The defendants pleaded—1. That the plaintiff did not assign, as alleged.

2. That after the said assignment, and before any rent became due, they assigned to one P. B., and that the said P. B. thereupon entered and became possessed for the residue of the term.

To the second plea the plaintiff replied, that the said assignment was made fraudulently, "and with the view and for the purpose only of defrauding the plaintiff of the said rent, without any real interest passing, or the possession of the said demised premises being ever delivered to the said P. B. under or by virtue of the same."

The defendants rejoined denying the fraud.

The following case was agreed to, and submitted for the opinion of the court:

CASE.

"By a lease dated 17th of January, 1846, and made between the said Thomas Stinson and the plaintiff, the premises therein described were demised to him and his assigns for a term of three years from 1st of May then next, at the yearly rent of 150*l.*, payable quarterly, on the first days of February, May, August, and November, in each year. On the 24th of March, 1848, the plaintiff executed to the defendants an assignment for the benefit of his creditors, (an extract from which assignment is given below, so far as the same is material to this case. The lease was then handed over to

the defendants, who took possession, and remained in possession, disposing of the stock of the plaintiff so assigned, as also of some goods belonging to the defendant Kennedy, sent over for sale at the same time, until the 31st of August, 1848, when they removed and quitted possession, and locked up the premises, but paid Stinson the landlord 125*l.* in full for the rent due up to the 1st of November following.

"The defendant requested Stinson to take the premises off their hands, and sent him the key, which he refused to accept, but it was afterwards, and before the rent sued for accrued due, enclosed in a letter and left at his office for him.

"On the 6th of January, 1849, the defendants executed an assignment of the premises to one Peter Badenoch, mentioned in the pleadings, who never took possession of the premises, and who had been a short time previously sold out by Kennedy, one of the defendants, and was in fact a pauper. He was a man of very dissipated habits, and would sometimes be drunk for weeks together.

"After the expiration of the term, the plaintiff was compelled by an action to pay two quarters' rent to Stinson. The present action is brought to recover back the money so paid. The plaintiff, after the assignment to defendants, removed to London, and never heard of the assignment to Badenoch until after the commencement of this suit.

"Extract from the assignment mentioned in this case:—

'Whereas the said party of the first part is indebted unto the said several parties hereto of the third part, in the several sums of money set opposite their respective names; and being unable to pay the whole of such debts, he has proposed and agreed to convey and assign all his real and personal estate and effects unto the said parties of the second part; and trust for themselves and the rest of his said creditors, in manner hereinafter mentioned: And whereas the said creditors, considering the present situation of the affairs of the said party of the first part, have consented to accept the said offer. Now, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of five shillings to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, he the said party of the first part hath granted, bargained, sold and assigned and by these presents doth grant, bargain, sell and assign unto the said parties of the second part, their executors, administrators and assigns, all and singular the merchandize, stock-in-trade, chattels, debts, and effects of him the said party of the first part what-

soever, and wheresoever; and also all and every the bills, notes, bonds, policies of insurance and other securities, and all other the property and effects of him the said party of the first part of what kind or nature and wheresoever situate, and being, and in whosoever hands, custody or power, the same or any of them, or any part, or parts thereof, now are, or at any time hereafter may be, and mentioned, or intended to be mentioned in the schedule hereunto annexed, or hereafter to be annexed; save and accept therefrom the household furniture, house, buggy, cow, and cutter, of him the said party of the first part—to have, hold, receive,' &c.

“The questions for the opinion of the court are,—

“1st. Whether the words of the assignment above given are sufficient to pass the plaintiff's interest in the lease, or whether any interest in fact passed to the defendants upon the facts stated, so as to render them liable as assignees of the term.

“2nd. Whether under the circumstances above stated, the defendants could be held liable for the rent accruing due subsequent to the assignment to Badenoch, as well as for the costs incurred in the said action brought by Stinson against the plaintiff.

“If the court should be of opinion that the defendants, upon the facts stated and the pleadings, are liable, then a judgment is to be entered against them by confession for the said rent and interest. If the court should be of a contrary opinion, then the plaintiff agrees that judgment of *nolle prosequi* shall be entered against him.”

M. Vankoughnet for the plaintiff, cited *Beck dem. Fry v. Phillips*, 3 Burr. 2827; *Burton v. Barclay*, 7 Bing. 745.

Burton for the defendants, cited *Weeks v. Maillardet*, 14 East. 568; *Dyer v. Green*, 1 Ex. 71; *Bally v. Wells*, 3 Wils, 25; *Chancellor v. Poole*, Doug, 764; *Taylor v. Shum*, 1 B. & P. 21; *Burnett v. Lynch*, 6 B. & C. 589; *Wolveridge v. Steward*, 3 Tyr, 637; *Farish v. McKay*, 5 U. C. R. 461; *Ashford v. Hack*, 6 U. C. R. 541.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Burnett v. Lynch* has no application to this case, for that turned wholly on the defendant having been guilty of a breach of duty while he enjoyed the premises as assignee. Here the plaintiff seeks to make these defendants, who were at one time holding as assignees of

the lease, liable for rent accrued after they have assigned to another party ; and there is no proof that after the assignment the defendants either occupied the premises or received the rents and profits.

The question, however, is, whether the plea of fraudulent assignment is proved. The case of *Taylor v. Shum* (1 B. & P. 21) is a clear authority that the law does not hold it to be fraudulent in an assignee of a lessee to assign his lease to a pauper, for the express purpose of getting rid of his liability for rent, by destroying the privity of estate on which alone an action against him could be founded ; and in this case it is stated that the assignee offered and desired to surrender up the premises to the lessor, which makes it a case fully as favorable for the lessee as *Taylor v. Shum*. I refer also to *Lekeux v. Nash* (Str. 1221) and to *Valliant v. Dodemedo* (2 Atk. 548).

It has, however, been contended that in fact this lease was not assigned, for that it is not included in the words of the deed of assignment made by these defendants to *Badenoch*. We are of opinion that this deed did pass the interest in the lease. (a)

Our opinion is in favor of the defendants and by the terms of the special case a *nolle prosequi* is to be entered by the plaintiff.

Judgment for the defendants.

In re LONEY, APPLYING FOR PARTITION.

Partition—2 W. IV., chap. 35—Time for service of notice.

A writ of partition cannot be ordered unless notice has been given forty clear days before the term ; Therefore, when the service was made on the 21st of July, and the term began on the 30th of August, it was held insufficient.

This was an application for partition. This term began on the 30th of August, and notice to the parties concerned appeared to have been served on the 21st of July. The question was, whether this was a sufficient compliance with the statute 2 W. IV., ch. 35., sec. 2, which requires that the notice shall be served “at least forty days before the ensuing term.”

D. G. Miller for the applicant.

(a) *Fagg v. Dobie*, 3 Y. & C. 96.

ROBINSON, C. J.—We think the notice insufficient, and as we have only jurisdiction to award the writ, provided notice has been served *at least* forty days before the term, we must see that that has been done, for otherwise the whole proceeding would be nugatory. This cannot be treated as a mere direction. It is made the condition on which alone we can act. There was not in this case forty clear days before the term, and there must be that when the expression is “*forty days at least.*”

Writ refused.

MICHAELMAS TERM, 16 VIC.

Present :

THE HON. JOHN BEVERLY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

GRANTHAM V. POWELL.

13 & 14 Vic., ch. 61, retrospective effect of—Objection allowed, not taken at the trial.

The plaintiff sued, in 1849, on a debt which accrued more than six years before. A new trial was granted in 1850, but the second trial was delayed until 1852. *Held*, that the 13 & 14 Vic. ch. 61, which came into operation in January, 1852, precluded him from recovering on a verbal promise.

The court, under the circumstances, allowed the defendant to claim the benefit of this statute, though he had not insisted upon it at the trial, but had objected to the sufficiency of the evidence on other grounds.

Assumpsit on a promissory note of defendant, made on the 22nd day of December, 1841, to plaintiff or order, for 12*l.* 10*s.* payable in 90 days. And on another note made on the same day, by defendant, payable to plaintiff or order, in six months, for 12*l.* 10*s.*: with counts claiming money to be due upon sale of a horse, for hire of horses, &c., for keeping plaintiff's horses, for work and labor, and on account stated.

The action was brought in March, 1849. Pleas filed on the 17th of March, 1849.

1st and 2nd—*Non-fecit*, to the notes.

3rd—*Non-assumpsit*, to the other counts.

4th—Statute of Limitations.

The plaintiff replied, that the cause of action did ~~accrue~~ within six years.

At the trial, before Burns, J., at Toronto, there was ~~some~~ evidence that while the notes were lying in the hands of Messrs. Gamble & Boulton—some other party, and not ~~this~~ plaintiff, being then the holder—the defendant promised them he would pay them. This was in 1843 or 1844. And the plaintiff himself swore, that, about three years ago, he called on the defendant and asked him to pay an account of about 15*l.*, which he claimed to be due to him independently of the notes, and that the defendant said ~~he~~ would pay it as soon as he could. This evidence ~~was~~ contradicted by the defendant on oath, as regarded the account. The learned judge directed the jury that, as to the notes, if there was an admission within six years of the ~~9th~~ of March, 1849, that they were due, that would be ~~suffi-~~cient, though it was objected that any promise on that occasion made to Messrs. Gamble & Boulton would ~~not~~ enure to the plaintiff, as they did not then hold the notes for him. As to the account, it was left to the jury to determine upon the evidence.

The jury gave their verdict for the plaintiff 55*l.* 15*s.*

The question seemed not to have been raised at the trial, whether since the statute 13 & 14 Vic. ch. 61, a verbal acknowledgement or promise can avail to take a case out of the statute, even when, as in this case, the issue had been joined, and the case once tried, and a new trial granted before that act was passed.

A new trial was granted in 1850; and for some reasons not explained the plaintiff delayed going to trial a second time until the last assizes.

Vankoughnet, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited *Towler v. Chatterton*, 6 Bing. 258; *Freeman v. Moyees* 1 A. & E. 338; to which

Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon the trial, it was objected that there had not been such a search made for the notes sued on as could warrant the letting the plaintiff into secondary evidence of them. But, considering that the notes were proved on the former trial, and were in the possession of the court—though among the officers they could not at the moment be found—and considering that they have been found since, it would be idle to grant a new trial on that objection.

The new trial has been moved chiefly on the ground, not taken at the trial, that since our statute 13 & 14 Vic. ch. 61, which, following Lord Tenterden's act in England, requires a written promise or acknowledgement to take a case out of the Statute of Limitations, the verbal evidence was improperly received in this case.

That act was passed in July, 1850. It enacts, that, in all actions on simple contract, "no acknowledgement or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said act" (the Statute of Limitations), "or to deprive any party of the benefit thereof, unless such acknowledgement or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby." And the act was to take effect on the 1st of January, 1852. This action was brought, and the first trial had, before the passing of this statute; but this second trial was not had until nine or ten months after the act had commenced to take effect. The words of this enactment closely follow those of Lord Tenterden's act, and we must give them the same construction, and are therefore bound to hold that they are retrospective in their operation, and apply to actions brought before the passing of that act, and not only to actions to be brought thereafter; and there is less appearance of hardship in this, as regards our act, because it gave to creditors an interval of nearly eighteen months between the passing of the act and the commencement of its operation, so that they could not be taken by surprise, and had ample time to enforce their demands before they could suffer any disadvantage from the change made in the law.

The only doubt we have had raised from the fact that the defendant did not, upon the trial, insist on the benefit of the statute; but the defendant did insist on the insufficiency of the evidence, though he relied on other grounds. As regards the account, indeed, the evidence was only the testimony of the plaintiff himself, who swore that within six years, on his demanding the debt, the defendant said he would pay as soon as he could; in other words, when he was able, which has been held not sufficient, unless proof be given of the party's ability. (a)

New trial on payment of costs

GILMOUR V. HALL AND PLATT.

Sum stipulated to be paid per week for delay in completion of agreement, held liquidated damages, not a penalty.

Covenant on an agreement to build certain cottages for the plaintiff, (the same as set out in *Hall & Platt v. Gilmour*, vol. ix., 492)—tried before Burns, J., at Toronto.

The defendants stipulated that they would complete two of the cottages by the 1st of December, 1850, and the other three on the 1st of January, 1851, except the tuck pointing, which was to be done by the 1st of June, 1851, "under a penalty of 5*l.* for each of the said cottages for each week, after the aforesaid respective times at which they were by the said last mentioned articles of agreement so to be respectively finished as aforesaid, during which they should respectively remain incomplete, to be paid by the defendants to the plaintiff."

The verdict given included the full amount which could be claimed under this agreement, for the time occupied in completing the cottages beyond that allowed.

M. Vankoughnet moved for a new trial for misdirection, and because the verdict was against evidence, and for excessive damages; he referred to *McLean v. Tinsley*, 7 U. C. R. 40; *Ainslie v. Chapman*, 5 U. C. R. 313.

ROBINSON, C. J.—We think the only question is, whether the 5*l.* per week is liquidated damages, or to be regarded rather as a penalty. If the former, the verdict is admitted to have been founded on a correct computation as to amount.

(a) See *Hayden v. Williams*, 7 Bing. 163.

The learned judge considered that the five pounds was liquidated damages, to which plaintiff was legally entitled, if the defence was not made out.

We think it admits of no doubt that the stipulated payment of five pounds a-week in case of delay is to be treated as liquidated damages, and not as a penalty.

Per Cur.—Rule refused.

DOE DEM. SHEPHERD V. BAYLEY.

Ejectment—Statute of Limitations—Evidence—Dispossession.

One Lee, in 1822, obtained a patent for a lot of land on which he had previously lived for several years ; but before the patent issued he had removed to another part of the country. After his removal, one M. made some agreement with him to purchase the lot, and went up and lived on it till 1823, when he died. M's wife, soon after his death, disposed of the place, or her right in it, to W. B., the defendant's father, who occupied the adjoining lot. It did not appear that M. ever had any interest beyond an agreement to purchase, or what were the conditions of his agreement, or what his wife received from W. B., or that she gave to him a writing of any sort. W. B. built a house on the lot, which was occupied by himself, his widows and sons, in succession until 1825, after which it remained vacant. The defendant lived on the lot adjoining, and there was conflicting testimony as to the nature of the possession held, and the acts of ownership exercised by him over the land in question, up to the time of this action. The above facts were relied on as entitling him under the statute of limitations. The plaintiff proved that in 1824, Lee conveyed to S., her husband, under whom she claimed as devisee ; that S. had gone twice expressly to see the land, in 1830 and 1832, on each occasion taking with him persons to whom he proposed to sell ; that on the first visit they saw the defendant who made no objection when told by S. that he had come to take possession, and that he was going to sell the property : that on the second visit the defendant agreed to purchase the land from S., but afterwards failed in the payments which he had promised to make.

Held, that the tenancy by the defendant up to 1830, could be considered only as a tenancy at will, as the widow of M. under whom he claimed could for all that appeared, have given no better right ; and that the entry in 1830 was sufficient to determine the will.

That the defendant's agreement to purchase in 1832 constituted a new tenancy at will, and the statute began to run at the expiration of a year from that time.

That it should have been left to the jury to say, whether under the evidence, the possession held by the defendant was of that constant and visible kind which would be sufficient under the statute.

And *semble* that the plaintiff was at all events entitled to a verdict ; for either S. was never in possession in respect to the patent under which he claimed, and therefore could not be said to have been dispossessed—in which case the statute never began to run against him ; or, if in possession at all, it must have been by virtue of his actual entry in 1830 and 1832, since which times twenty years had not elapsed.

Ejectment for lot 69, south side of the Talbot road, in the township of Oxford.

This was a second trial of this title.

Upon the present occasion, the evidence was to this effect—Francis Lee, on the 8th of November, 1822, obtained a patent for this lot, 69. He had resided on it for several years before that, had cleared and enclosed some of the land, and had built a house; but before the patent issued he had left that part of the country, and had come to reside in the township of York, in the Home District. One Miller entered into some contract with him there for the purchase of this lot, the particulars of which were not in evidence on this trial; and he went up to Oxford and resided on the lot with his family till some time in 1823, when he died. William Bayley, father of the defendant in this action was then living, as he had been for some time with his family, on the adjoining lot, 70. Miller's wife continued to live on lot 69 for a short time after her husband's death, but afterwards, in the same year, she took upon herself to dispose of the farm, or of her right in it, to William Bayley for some trifling consideration, far below the value of the land. It was not shewn that her husband Miller had any right or interest beyond an agreement to purchase, nor was it shewn what he had paid to Lee, or whether he had ever paid anything, or within what time, or in what manner he was to pay. It was not proved that Mrs. Miller was dead, but she was not examined as a witness at the trial, nor any reason given for not producing her; though it was urged that she must have known no doubt the footing on which her husband had stood in regard to this lot, and upon what ground it was that she took upon herself to dispose of it to Bayley, and to put him in possession, which it seems she did in 1823. No writing between her and Bayley was proved or spoken of at the trial, and, for all that appeared Miller had died intestate.

William Bayley, the defendant's father died in 1824, in possession of lot 69, having removed into the house which he had built upon it. His widow continued to live in the same house for some time, but removed to the lot 70, where she and her two sons, Robert and George, lived together till she died. Since the year 1825 it seemed that no one had

resided on this lot. The house built by Lee was allowed to go into decay and tumble down; the fences were suffered to be out of repair; some of the witnesses swore that for some years the cleared land lay waste; others swore that the defendant, William Bayley—continuing to live on lot 70, after the death of his brother Robert, which soon occurred—had raised crops and pastured his cattle on this lot 69, without interruption, and had cut wood off it—which acts were given in evidence in order to shew a continued exercise of ownership over the lot by Miller, William Bayley and his widow, and by the defendant George Bayley, from 1822 or 1823 to the present time. The evidence seemed to establish that the defendant, living upon his own adjoining property, had for this long period made that kind of use of this adjacent land, which a neighbor might in such case make of a neglected or forsaken lot—not living on it or making any substantial improvements, or keeping up the enclosures, or subjecting it to any regular course of husbandry. The defendant relied on this evidence as conferring a title upon him under the Statute of Limitations, or at all events as shewing that any title which Lee might have had when Miller took possession had become extinguished.

On the side of the plaintiff it was shewn, before the defendant went into this evidence of possession, that Lee on the 27th of July, 1824, nearly two years after the patent had issued to him, conveyed the lot 69, being 200 acres, by bargain and sale, to one Thomas Shepherd in fee simple for a consideration expressed in the deed of 200*l.*; and that on the 27th of May, 1841, Shepherd devised the land to his wife Tabitha Shepherd, the lessor of the plaintiff, to hold during her life. It was proved further that, in 1824, when Lee, then in the township of York, was in treaty with Thomas Shepherd about selling this land to him, the widow of Miller was there, and heard them conversing about it; that she said to them she did not wish to wrong any one; that Bayley had paid her for the land, (that is, had paid her something, for the proof was only of a trifling payment, and there was no evidence of any writing given by her to

Bayley, or of any right she could have supposed she had to dispose of the farm); and she told Shepherd that if he took the land from Lee he should go and pay back to Bayley what he had given her.

It was proved further that Thomas Shepherd had gone up to see the land in 1824 before he purchased; that after he got his title from Lee he went up twice—namely in 1830 and 1832—expressly to see the land, (a distance of nearly 200 miles,) on each occasion taking with him a person who proposed to purchase it; that on both occasions they found the farm unoccupied, and apparently deserted, no persons living on it, the fences down, and no appearance of the land having been ploughed or cultivated for several years, that in 1830, when Shepherd went to the land he was accompanied by one Ricketts, a farmer to whom he proposed to sell it; that this defendant came to them upon the land from his adjoining lot 70, on which he lived; that he was told by Shepherd that he (Shepherd) had come to take possession, to which the defendant made no objections; that Shepherd and Ricketts remained more than an hour on the lot; that Shepherd planted a small tree on the lot in presence of the defendant, telling him that he did so as an act of taking possession, and that he was going to sell the land to Ricketts; that the defendant made no objections, and that Ricketts had no knowledge, from anything that passed or otherwise, that the defendant had set up any claim to the land, which however Ricketts did not buy, because, as he said, it did not suit him. This visit of Shepherd to the land took place within twenty years of bringing this action.

The next visit was made two years afterwards, when a brother of the late Thomas Shepherd, who was examined as a witness upon the trial, went up with him, intending to buy, if he liked the land. He swore also, that the land then looked as if it had not been ploughed or cultivated for several years; and that the fences were in a ruinous state: that no one was on the lot, but that finding the defendant in a field on the adjoining lot 70, they went to him: that Shepherd's brother said he wanted more than 200 acres,

and that Shepherd asked the defendant if he would sell his lot (70), which he declined; and that Shepherd thereupon offered to sell him his lot (69): that they went into the defendant's house, and conversed about it; and that before they left that part of the country (the next day) the defendant agreed with Shepherd to give him 200*l.* for lot 69, and that he would come down to Toronto in the autumn and pay 50*l.*, and would pay 50*l.* in each of the three next years; but that though they parted with this understanding, he never came.

According to evidence given for the defendant on the trial, Miller was assessed for the lot 69 in 1822, the widow Bayley, in 1825 and 26, Robt. Bayley (her son) in 1827-28, and 29; but there was no proof that he or this defendant (George Bayley) gave in this lot to the assessor after that period or after Shepherd had been up and asserted his right to the lot.

At the conclusion of the trial, the learned Chief Justice of the Common Pleas submitted several questions of fact to be determined by the jury, and on considering these they declared themselves to be satisfied.

1st, That Lee knew that Miller was in possession between the date of his patent (November, 1822,) and of his (Lee's) deed to Shepherd in May, 1824.

2ndly, That the defendant, and those who preceded him in the possession, were in possession of the whole lot 69, as well as of that which was uncleared as of that which was cleared.

3rdly, That Shepherd, in 1830 and 32, did make actual entry with a view to take possession.

4thly, That the defendant had not recognized Shepherd's title.

The learned Chief Justice considered that the lessor of the plaintiff (the widow and devisee of Shepherd) was barred by the Statute of Limitations: that the entry of Shepherd upon the land in 1830 and 32, as described by the witnesses was not sufficient to prevent or interrupt the operation of the statute: that the defendant's verbal offer to purchase would signify nothing: that this case was not, under the circumstances, within the exception at the end of the 17th

section of our Real Property Act, 4 Wm. IV., ch. 1: that it was unnecessary to leave it to the jury to find whether Lee, Miller and his widow, William Bayley and his widow, and the defendant had succeeded each other in the possession; because it seemed the only just inference from the evidence that they did so, and because he considered it to be immaterial whether there was a continuous and successive possession or not, if Shepherd's entries, in 1830 and 32, did not give him possession (which he held they did not), because he had not otherwise made entry at any time after his right to enter accrued—viz., in May, 1824—at which time William Bayley was in possession, and more than twenty years had elapsed before Shepherd died, or the lessor of the plaintiff acquired any right under his will.

The jury found for the defendant.

Wilson, Q. C., shewed cause against a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited *Doe dem. Birmingham Canal Co. v. Bold*, 11 Q. B. 127; *Doe dem. Evans v. Page*, 5 Q. B. 767; *Doe dem. Linsey v. Edwards*, 5 A. & E. 95.

Phillpotts, contra, cited *Doe dem. Boulton v. Walker*, 8 U. C. R. 571; *Doe Bourne v. Burton*, 15 Jur. 990; 6 English Rep. 325, S. C.

ROBINSON, C. J.—The impression which I have received from the whole evidence is, that Lee, being the undoubted owner of this lot in 1822, contracted to sell it to Miller, for payment to be made to him; and that on the faith that Miller would make those payments he allowed him to enter into possession; that Miller very soon after died, leaving Lee unpaid; that his widow, soon after, probably seeing no prospect of being able to pay for the land, left it, and returned with her family to her husband's former place of residence, where Lee was at that time living; but that before she went she took upon herself to sell either the land, or her claim to the land, to Bayley, the owner of the adjoining lot.

I have no idea that Miller had paid Lee for the land; or that his widow, or his two sons, who were examined on the trial, had any belief that he had; or that he had any conveyance from Lee. They produced no writing, nor

gave proof of the contents of any writing, nor attempted to shew that any such writing had been lost, or mislaid; and it is obvious, I think, that when Mrs. Miller returned to Lee's neighborhood, and heard him proposing to sell the land to Shepherd, and when she urged that Shepherd, if he bought, should return to Mr. Bayley what she had got from him,—if she had imagined that Lee had already conveyed to her husband, or that the land had been paid for by her husband, or that she had any right to sell to Bayley, she would not have contented herself with insisting that Bayley should have the money returned to him which he had paid to her, and which was no equivalent for the value of the land, but would have insisted that Lee had no right to dispose of the property. And it is equally obvious that if Bayley had held any writing from Mrs. Miller, or any deed or agreement that had been given to her husband, or had anything whatever to shew on what foundation she had assumed to sell to him those 200 acres for which a patent had issued to Lee only two years before Mrs. Miller quitted the lot, he would have given evidence of it at the trial and would have produced it when Shepherd came up twice to assert his right; and would then have advanced his claim, and stated what it was founded on. Instead of that, all that is proved beyond possession, in support of the defendant's title, is, that Miller's widow—who, for all that appears, could have had no legal interest in the land beyond her claim to dower, even if Miller had owned it—sold for a small consideration the possession of it to the defendant's father.

If Bayley took any writing from Mrs. Miller, which is not asserted, and if that were produced, it might turn out to be nothing more than a conveyance of her supposed right of dower, or an assignment of whatever claim she had contingent upon the steps which he might think proper to take; or possibly a mere consent that he might stand in her place, or in Miller's, and pay what Miller ought to have paid provided Lee would confirm the arrangement. The probability is, that the forty dollars and the house, which it was sworn that William Bayley gave her, were accepted as an

equivalent for what Miller was known to have paid to Lee on account, which it would be right that Bayley should pay to Miller's representative, if he got the land ; and we can understand, if that were so, why Mrs. Miller should have urged that if Lee sold the land again to Shepherd, Bayley should get back from Lee or Shepherd what he had thus paid to her.

It is true that, in any view we can take of the evidence, Thomas Shepherd seems to have been unaccountably negligent in not adopting such measures as we should suppose he would have adopted in regard to this valuable property, which he is not shewn to have taken any particular notice of since his visit in 1832, though he lived, I think, more than fifteen years after that. How this might be explained I know not. But, on the other hand, this defendant does not stand in the situation of a person buying from one who had been twenty years in undisturbed possession, and whose title he might therefore have presumed was unquestionable. It is evident that he and all his family must have known the history of the lot from Lee's first connection with it. He knew, no doubt, upon what footing Miller succeeded Lee, how Mrs. Miller came to abandon the lot, and what kind of a right his own father had acquired, or had any reason to suppose he would acquire from her ; and, besides this, it is clear enough that none of those who have succeeded Miller in the possession have acted with this property as if they owned it.

Nevertheless this is, perhaps on the whole complexion of it, one of those cases which the Statute of Limitations was designed to meet, for it may happen that the parties after so long a lapse of time might not in a case of this kind be able to shew satisfactorily what the facts really were. Then, in applying the Statute of Limitations to it, we must consider that it was the avowed object of the present statute to avoid all questions about the possession being adverse or non-adverse, and that in cases within the statute (that is, cases not taken out of it by any exception) the mere fact that the true owner has for twenty years allowed himself to be dispossessed of his estate—not receiving the

rents and profits within that time, and having no written acknowledgment of his title to produce, signed by the party holding possession—is sufficient to extinguish his title. This is a stringent rule, which the statute prescribes, and one that may lead in some cases to great injustice and hardship, where there has been an occupation permitted as a matter of indulgence, or through mere inattention, to a party who had never defied or questioned the title of the rightful owner, and who had never pretended to have a title himself. Still the answer is, that, under the provisions of this positive law, good nature or inattention may occasion a man to lose his estate, however, clear may be his right, for that the provisions of the statute are peremptory, and that it is necessary to enforce them, in order that all may see that there is an absolute and inflexible rule which will be adhered to, for the sake of quieting possessions. If this be the true principle, as undoubtedly it is on the one side, it is no less true and just on the other side that no man's legal title should be extinguished by the operation of this statute, unless the facts are such as do clearly, and without the aid of any liberal construction, bring his case within it; and that he should have the full benefit allowed him of every exception which fairly takes his case out of the statute. So much, at least, is due to the former owner of the estate.

Now, in this case the statute could not begin to run until after the patent issued; that patent made Lee the owner, Miller going in under a contract of purchase from him, without any more being shewn—that is, without any assurance from Lee that he might hold the possession for any certain time, or until any particular contingency—could be, at most, tenant at will. He was in possession in privity with the owner, without right being proved in him to hold for any certain time; his widow can only be looked upon, in the absence of any proof to the contrary, to have been holding merely in consequence of her husband's possession, with no better right, and not by any title independently of him. Then we see from the evidence that William Bayley, his widow, and their son, the present defendant, all held in

succession under no other right than the widow of Miller gave them; and the right of all of them to hold for any longer time was liable to be put an end to before twenty years had elapsed, by any act that would terminate a tenancy at will; though indeed it is clear that there could be no subsisting tenancy at will even, after the changes which the possession had undergone, from the death of the several occupants. Taking it, however, to be most strongly in favour of the occupants, and that they were respectively something more than mere tenants at sufferance—the jury found that, in 1830 and 1832, Shepherd, the owner, whose legal title there was at that time nothing to impeach, of which we have any evidence whatever, made any actual entry, for the express purpose, and with the intention declared in the defendant's presence, of asserting his right and taking possession. The jury found that he did enter for that purpose and with that intent; and if they believed the witnesses who swore that in 1832 the defendant, after the tenant had so entered, agreed to purchase from him, and promised to go down to Toronto in the fall and pay him 50*l.* on account of the purchase, that would constitute a new tenancy at will after the first had been determined, and the statute would in that case have begun to run at the expiration of a year after that, or in 1833—in which case this action was brought in time.

The entry proved by two witnesses, and found by the jury, was in my opinion a sufficient entry to determine the will, notwithstanding anything in the 22nd section of the statute—On that point I refer to *Doe dem. Tomes v. Chamberlain* (5 M. & W. 14), and *Doe dem Bennett v. Turner* (7 M. & W. 226; S. C. 9 M. & W. 643 in error), *Ball v. Cullimore* (2 Cr. M. & R. 220.)

The jury, we think, should have been told that, unless they disbelieved the evidence to which I refer, they should find for the plaintiff.

And I confess that, besides this, I do not consider the evidence of dispossession of the owner by the acts of the defendant, so clear as to have rendered it unnecessary to submit a question to the jury upon that point. It may be

that the defendant did more than let his cattle run upon an unoccupied lot that lay common to all the world, and he may have held that constant visible possession of it which could only be regarded as exclusive possession, and a shutting out of the true owner; but that point seemed not contradicted upon the evidence, and I think the jury should not have leaned against the true owner in a case where they saw so clearly the origin of the defendant's possession, and that in the nature of things it could not have been supposed to have been either taken in ignorance or under any idea of legal title.

We are of opinion that there should be a new trial; with costs to abide the event.

Strictly speaking, the statute could not have begun to run against Lee until Miller died, because he was never, in the language of the 17th section, dispossessed; he had never been in possession in respect of the estate or interest given to him by his patent, further than by construction of law; and he was not dispossessed by Miller's possession, which was in virtue of an agreement with Lee, and in privity with him. Then, when Miller died, and the widow continued to hold possession, that was not a dispossession of Lee from any occupation he had ever held; nor could her possession, nor the subsequent possession of the Bayleys derived through her, be deemed a disseizin, because all had reference to Miller's interest. There was no difficulty therefore in the way of Lee conveying to Shepherd, and I do not see how the statute can be said ever to have commenced running against Shepherd, because he had never been in possession in respect of the right or interest claimed by him, unless the entry made by him be admitted to be a possession, since which twenty years have not run.

DRAPER., J., and BURNS, J., concurred.

New trial; costs to abide the event.

MAIR V. CULY AND YOUNG.

Usury—Party to a suit calling the opposite party, how far bound by his evidence.

Where a party to a suit calls the opposite party, he is not necessarily concluded by his answers.

Ejectment on a mortgage. The defendants pleaded usury, and they produced two papers purporting to be copies of letters written by the mortgagor to the plaintiff (the mortgagee), as tending to shew that they were replies made by the mortgagor to letters written by the plaintiff, which were produced; and they relied upon the whole correspondence as making out clearly a usurious bargain. The plaintiff was called, and swore that he had never received the letters of which the defendants professed to produce copies, and that there was no usury in the mortgage transaction.

Held, That it should nevertheless have been left to the jury to say whether they did not believe, from the plaintiff's own letters that such answers had been received as the defendants relied upon; and if so, whether on the whole correspondence, there was sufficient proof of usury.

EJECTMENT for 228 acres in the township of Brantford, described by metes and bounds, and commonly known as "the Brant Farm."

The defendants appeared, and did not limit their defence to any portion of the land claimed. Notice was served of the plaintiff's intention to go for mesne profits.

On the 25th of June, 1836, the Crown granted the land in question to William Johnson Kerr, Esquire, as purchaser, for 228*l.*, describing it as part of the north part of the farm known as "the Brant Farm," formerly owned by the late Captain Joseph Brant, and devised by him to his son (the late John Brant), his heirs and assigns.

On the 20th of December, 1836, William Johnson Kerr, by deed of bargain and sale, mortgaged this land in fee to the present plaintiff (Mair), with condition to be void on payment by Kerr of 625*l.*, within one year from the date, according to the condition of a bond recited in the mortgage as bearing even date with it; Kerr to remain in possession till default made in payment. No interest was made payable on the 625*l.* for the year.

The mortgage was registered on the 2nd of January, 1837. On the bond was endorsed by the plaintiff a payment of 300*l.*, made by Kerr on the 9th of September, 1837.

The defendants set up the defence of usury; and at the trial, at Hamilton, before Sullivan, J., they relied upon two papers (purporting to be copies of letters written

in November, 1837, by Kerr to the plaintiff, dated on the 9th and 22nd of November), as tending to shew, when read in connection with letters produced, written by the plaintiff to Kerr, and received by the latter, that they were replies made by Kerr to the plaintiff's letters; or rather that a letter of the plaintiff to Kerr, of the 15th of November, 1837, was an answer to Kerr's of the 9th of November: and that a letter of the plaintiff to Kerr, dated 2nd December, was a reply to one from Kerr to him on the 22nd of November, 1837. The plaintiff then lived at Brockville, and Kerr at Wellington Square, in the township of Nelson. The defendants relied upon the contents of these letters as bearing a clear internal evidence that they were written as a connected correspondence, and they contended that Mair's two letters shewed clearly that he must have received from Kerr the originals of such letters as the papers produced at the trial purported to be copies of.

Notice had been given to Mair to produce these letters and he was called as a witness by the defendants and swore positively that he had received no letters of that kind from Kerr. He swore also that there was no usury in the mortgage transaction, as Kerr's letters (according to the copies produced) would import there was.

Mr. Kerr died about seven years ago.

The learned judge told the jury that he considered there was no legal evidence to prove usury. It was objected by the defendant's counsel, that it was a question to be left to the jury whether they did not believe, from the contents of Mair's own letters, which were in evidence, that he must have received such letters from Kerr as the papers produced in Kerr's writing, and found among his papers, purported to be copies of; and whether they were not satisfied, upon the face of the correspondence, that the transaction was usurious. He relied upon the correspondence as affording convincing evidence that 500*l.* was all the money lent, for which 625*l.* was to be paid at the end of a year—being twenty per cent. interest and 25*l.* *bonus*.

The jury found for the plaintiff, and 130*l.* damages for mesne profits.

Cameron, Q. C., moved for a new trial on the law and evidence, and for misdirection.

Hagarty, Q. C., shewed cause, and cited *Tay. Ev.* 42, 503, 541, 542; *Hutchinson v. Bowker*, 5 M. & W. 535; *Neilson v. Harford*, 8 M. & W. 823; *Doe dem. Frankis v. Frankis*, 11 A. & E. 792; *Fairlie v. Denton*, 3 C. & P. 130; *Jones v. Morrell*, 1 Car & Kir. 266; *Melluish v. Collyer*, 14 Jur. 621; *Doe dem. Strickland v. Strickland*, 8 C. B. 724.

ROBINSON, C. J.—It does not seem to have been made a question at the trial whether these defendants were liable to the plaintiff for mesne profits. That a mortgagor remaining in possession is not liable to account to the mortgagee for mesne profits, is clear: though his lessee, under certain circumstances, may be. What was the nature of the occupation by these defendants does not appear, with certainty, upon the evidence; by whom they were let into possession, or how they held, or for what time. It may be that, upon the facts of this case, the plaintiff was entitled to recover for mesne profits against these defendants, though he stands only in the position of a mortgagee.

Upon the question that has been raised, we have no doubt that (although the defendant made the plaintiff their witness, by calling him to prove that he had received from Kerr such letters as the papers produced in Kerr's writing purported to be copies of) it did not necessarily follow, that they were bound by his answers, so that they could not even rely upon the internal evidence to the contrary which his own letters contained; or attempt to establish, by other proof, the fact of usury, which the plaintiff denied. We think the learned judge took the case too strongly against the defendants, when he directed the jury that there was no legal evidence of usury: because, although the plaintiff, it is true, swore that there was no usury in the transaction; and swore also, that he never did receive from Kerr such letters as it was insisted his own answers in reply made it clear he must have received—yet the plaintiff's own letters, which were produced and not denied, bore internal evidence, more or less strong, both as regarded the receipt of letters from Kerr and their contents, and it was for the jury to consider them and pronounce upon them. We think it

cannot be correctly said that there was no evidence of usury to go to the jury—whether it was such as would or should have satisfied them that there was usury, is another question ; but in our opinion, it was too peremptorily excluded from their consideration, as having no legal bearing upon the question of usury. We make the rule absolute for a new trial, without costs.

BURNS, J.—The learned judge in this case assumed too strongly, I think, when he said to the jury there was no evidence of usury to go to them. The assumption was based upon the fact that the defendant called the plaintiff as their witness, and he denied point blank that any usury had been effected. The defendants had no other witnesses that the plaintiff himself, and copies of certain letters which it was said the plaintiff had received from Mr. Kerr, the mortgagor in his lifetime, and to which the plaintiff, it was said, had written the two letters in reply which were put in and proved. If the letters of the plaintiff were in truth replies to the letters which it was said had been written to the plaintiff by Mr. Kerr, then the four letters taken together would afford evidence that the mortgage had been made to secure a greater sum than six per cent. interest. Supposing the letters to have been clearly established, then the learned judge was wrong in saying that there was no evidence of usury to be determined upon. His observation, however, was based upon the fact that there was no evidence of it, save from what could be extracted from the plaintiff himself ; and he having denied that there was any usury, and having denied that he wrote the letters of his produced in answer to any such letters as the copies purported to be, and having denied that he had even received any such letters from Mr. Kerr, the learned judge considered that the defendants having voluntarily made the plaintiff their witness were bound by his answers. This presents a new feature of common law, which could not arise previous to the statute which permits the one party to call the opposite party as a witness. I have frequently while at *Nisi Prius* heard counsel assert to the other that their clients were ready to be examined by the opposite side, and remind the opposing counsel that if the examina-

tion took place the party must and would be bound by everything he stated. I have never had the opportunity of expressing my own opinion upon this point; for either, when a party has so been tendered, the opposite side has been alarmed and did not examine him, or, when there has been such an examination, the case presented did not call for any observation. It has now become very important that the line should be defined as to what extent the one party is bound by statements made by a hostile party whom it is absolutely necessary to call as a witness, and without whose evidence whether it be hostile or otherwise, the case must fail. The only analogous position in the common law courts is, where a witness represents a fact or circumstance to be different from what the party calling him expects he will do. In such case, though the party calling the witness cannot be allowed to impeach the character of his own witness, yet he is at liberty to prove the facts to be different or otherwise than such witness has represented them. A party who produces a witness thereby vouches for his respectability of character, and for his veracity and therefore he shall not be allowed to shew that he is unworthy of credit after he has been disappointed in his testimony. This rule can scarcely be said to be applicable to the parties themselves, because the very litigation between them and the points in issue are in dispute, and each denies to be true what the other says. The pleadings in almost every case brought down to trial prove the truth of this; and it would be hard indeed to believe that the party would go into the witness box when called by the opposite side, and there state what he himself had before asserted was all untrue; and it would be harder still to hold that a party should be conclusively bound by the statements made in his own favor, and that he should not be allowed to impeach the party so examined. The position is quite different from that of witnesses between whom and the parties calling them there is no contested issue to be tried. The parties themselves must know the truth, and the object of trial is to ascertain that truth. I have in my own experience known the truth as clearly established by a denial of the facts and

circumstances, when done evasively and accompanied with other circumstances, as it has been by affirmative evidence.

The courts of equity in their decisions present us with a clearer view of this subject than the common law courts, for in these courts the parties read passages of the answers of each other to prove what is desired, and then questions frequently arise how far the one who voluntarily reads the other's answer is thereby bound. In *Kempson v. Yorke* (8 Price 13) Chief Baron Richards, upon the defendants claiming that their case was established by the passage read by the plaintiff, says, "Then it was said on the part of the defendants, that the plaintiff having read this passage out of the answer is concluded by it, unless he proves by evidence of his own that the belief formed by the defendants is not a correct belief. Now I am of opinion that I am bound to look at and estimate all the evidence produced by the defendants, and that I cannot say because one party says he has heard and believes a thing, that therefore such belief is conclusive against the other in a court of equity. I know, on the contrary that when a party professes himself to believe an allegation, that the court is bound to see if it may not believe against him; but if the defendant says we believe so and so, there is no doubt that if the plaintiff gives evidence on the other side to shew the belief ill founded, that the plaintiff must succeed against that belief." And again: "I do not therefore hold myself bound to think that what was read from the answer was conclusive of all the facts upon which the defendants formed their belief; or that it is therefore to be considered as supported by evidence." In *Price v. Lytton* (3 Russ 206) the passage read from the defendants' answer was as follows,—“that this defendants hath let one of the said farms, including part of the said glebe lands, to Richard Blake, upon the conditions of his giving up the said glebe land when required so to do by the plaintiffs; and that the said defendant hath let the other farm, including the other part of the said glebe land, to Joseph Beaumont, who is ready and willing to give up such glebe land to the plaintiff,” Lord Lynnhurst, then Master of the Rolls, was of opinion that by analogy to the practice at law, which permitted a party

to disprove a circumstance that has been stated by his own witness, the plaintiff was at liberty to read evidence to disprove the allegation in the answer that Beaumont was willing to give up the glebe land in his occupation. Mr. Gresley, in his work upon Evidence in Courts of Equity, at page 16, has this passage from a manuscript report, "in a later case, the answer contained the following guarded admission: 'at the time when the said A. M. was, as untruly alleged in the said bill, wholly incapable of managing her own affairs, she wrote the following letter, &c. Mr. O. Anderdon (afterwards Q. C.,) asked the Vice Chancellor (Sir L. Shadwell) if he might read the admission that she wrote the letter, without letting in also as evidence the words, 'as untruly alleged in the said bill.' The Vice Chancellor said, 'No;' but as he intimated at the same time that the words would have very little effect upon his mind, Mr. Anderdon ventured to put in the passage as evidence, and then read the letter."

Notwithstanding the plaintiff's denial of his having received the letters, yet it was for the jury to say whether they believed that Mr. Kerr wrote the letters of which the copies were proved, and whether the plaintiff received them; and if so, whether the two letters of the plaintiff proved were written in reply to Mr. Kerr's letters: and if the jury found all that in the defendants' favor, then, notwithstanding the plaintiff's assertion that there was no usury, the letters were evidence of the fact, and should have been submitted to the jury to say, as a fact, whether the original loan or debt secured was or not 500*l.*; and whether or not as a fact, the 125*l.* more was secured for the purpose of obtaining more than six per cent. If 500*l.* was the original loan or debt secured, then it was obvious, from the terms of the mortgage and time of payment, that it was a usurious transaction. If the jury should find that the debt secured was no more, originally, than 500*l.*, they should have been told that the plaintiff must fail.

DRAPER, J., concurred.

Rule absolute.

CAMPBELL V. FRETWELL ET AL.

Will—Construction—Estate in fee, or for life.

J. C. died in 1809, leaving a will as follows :—He first devised different lands to his wife and children, giving them clearly an estate in fee ; then in a subsequent clause he gave and bequeathed “ *in like manner as before* ” to his wife the land in question, with other lots in the same concession, “ together with the equal third of all and singular of the property I now live on, to be for her support during her lifetime or widowhood, at which period it goes to such of my children as she may direct, the real and personal estate, to have and to hold, *the above described land as before described* with every appurtenance thereunto belonging, unto my said wife, her heirs and assigns forever.” The land on which the testator lived was in a subsequent clause devised in fee to his son J. C.

Held, that the words “the above described land” should be referred only to that described by lots ; and that the widow took an estate in fee in that, and a life estate with a power of disposal over in the land on which the testator lived.

EJECTMENT for the west half of lot numbered 12, in the second concession of the township of Augusta.

At the trial at the last spring assizes held at Brockville, before Burns, J., the facts proved were as follows :—The land in question, with various other lands belonged to James Campbell, of the township of Augusta. He died in possession thereof in the year 1809, and at that time the land in question was in a wild state. James Campbell lived upon lands in the front, or first concession of the township of Augusta, adjoining number 12 in the second concession. The land he lived on being called the homestead. On the 24th of March, 1809, he made his will, and thereby devised the land in question to his wife, Sarah Campbell. She afterwards sold a portion to one Scott, under whom the defendant Fretwell claimed, and the remainder to the other defendant Sherwood ; and she afterwards died in April, 1834. The plaintiff in this action claimed the half lot, as heir-at-law of James Campbell the testator, contending that Sarah Campbell took only a life estate in the premises under the will of her husband, James Campbell, which was determined by her death in 1834. On the other hand the defendants contended that Sarah Campbell took an estate in fee, and therefore had good right to sell and convey the premises. The clauses of the will of James Campbell upon which the question turned were in these words :—

"Secondly—I give and bequeath unto my beloved wife, Sarah Campbell, four hundred acres of land, it being known and distinguished by lot number nineteen, first and second concessions in the township of Oxford, be the same more or less—to have and to hold the above prescribed four hundred acres of land, with all and every privilege and appurtenance thereunto belonging, unto my said wife, her heirs and assigns for ever; and also my negro boy Pomp."

The 3rd clause devised lots 35 and 36, in Edwardsburgh, 400 acres, to his daughter, Ann Campbell, and his son, Thomas D. Campbell (the plaintiff,) to be equally divided between them, and to their heirs and assigns for ever.

The 4th clause devised to his daughter Catharine, lot number 11, and the east half of number 12, in Augusta, 300 acres, (without saying what concession,) to have and to hold to her and her heirs and assigns for ever.

The 5th clause devised unto his daughter Phebe, lots number six, seven, and eight, in the 5th concession; and number eight, in the 6th concession, in the township of Oxford, making 800 acres, to have and to hold to her, and to her heirs and assigns for ever.

The 6th clause devised to his daughter Maria, lots number seven and eight, together with the half of number seven in the 4th concession of the township of Oxford, to have and to hold the same to her and her heirs and assigns for ever.

The 7th clause was in these words—"I give and bequeath, *in like manner as before*, unto my loving wife, Sarah Campbell, all that certain tract or parcel of land better known by lots number thirteen, and the west half of number twelve, in the second concession of Augusta, being three hundred acres, be the same more or less, together with the equal third of all and singular of the property I now live on, to be for her support during her lifetime or widowhood, at which period it goes to such of my children as she may direct the real and personal estate, *to have and to hold the above described land as before described, with all and every appurtenance thereunto belonging, unto my said wife, and her heirs and assigns for ever.*"

The 8th clause devised to his executrix and executors therein named, 800 acres, known by lots as the half of lot 15 in the 8th concession of Leeds; lot 16, in 7th concession of Augusta; lot 1, in the 7th concession of Augusta; lot 25 and the west half of 24, in the 6th concession of Kitley together with the east half of lot number 6, in the 2nd concession of Augusta,—to have and to hold to them, their heirs and assigns, for the sole purpose of educating his children and accomplishing building as might be thought necessary. Then the will continued—"I give and bequeath unto my beloved son, James Campbell, all and singular, residue and remainder, I now and may have at my decease, together with that certain tract of land better known and distinguished by lot number eleven (excepting a small part, namely, twenty acres that is to be deeded to Thomas Doyle), and the whole of number twelve, together with the east half of number thirteen, all in the first concession of Augusta, making five hundred acres, be the same more or less, (*being the land on which the testator lived*); and also that tract or parcel of land better known and distinguished by lots number thirty-five in the eighth concession, and number twenty-seven in the seventh concession in Augusta aforesaid, amounting in all to nine hundred acres; to have and to hold the above described lands, with all the privileges and appurtenances thereunto belonging, to him my said son, his heirs, executors, and administrators and assigns for ever."

The testator then constituted his wife executrix, and his friends Samuel Booth and Vincent Booth, of Elizabethtown, executors.

The learned judge at the trial held that Sarah Campbell took an estate in fee, whereupon the plaintiff took a nonsuit, leave being reserved to him to move to enter a verdict for the plaintiff if the Court should be of opinion that Sarah Campbell took only a life estate in the premises in question.

In Easter Term last *Sherwood* obtained a rule *nisi* to set aside the nonsuit, and for a new trial, on the ground of misdirection, and on the leave reserved at the trial.

Hagarty, Q. C., during this term, supported the rule; he cited Jarm. i. 437, 478; *Ex. parte Davies*, 15 Jur. 1102;

Cr. Dig. vol. vi. ch. 17; Doe Humberstone v. Thomas, 3 O. S. 516; Pells v. Brown, Cro. Jac. 590.

Richards shewed cause, and cited Jarm. i. 411, 414.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the testator's widow took an estate in fee, under his will, in the premises in question; and that the plaintiff, who claims as his heir-at-law, was therefore properly nonsuited.

There is certainly an obscurity in the seventh clause of the will, so that it is difficult to give it such a construction as will make the clause consistent in itself, and consistent with the devisee of the 500 acres in the first concession of Augusta, made to James Campbell. But we have to determine what the effect of the will is in regard to the west half of lot 12, in the second concession. The testator had, by the second clause of his will, given to his widow 400 acres of land in another township, "*to have and to hold the same, with every privilege and appurtenance thereunto belonging, unto my said wife, her heirs and assigns forever.*" Nothing can be more express than these words, as regards the intention to devise the fee. In the same formal manner the testator devises to several of his children other lands with proper words of inheritance: and then in the seventh clause, he says, "I give and bequeath, *in like manner as before*, unto my wife Sarah Campbell, lots 13 in the west half of 12 in the second concession of Augusta." Now as he had made no previous mention in his will of those particular lots, he could not have intended that the words "*in like manner as before*" could have any special reference to them; he could only mean, that he gave and bequeathed these lands to his widow in like manner as he had given and bequeathed to her the other lands—that is, to hold to her, her heirs and assigns for ever. The plaintiff has nothing to rely upon, as warranting a different construction, or even for raising a doubt, except what is said later in his will in connection with the devisee of other lands—"together with the equal third of all and singular the property I now live on, to be for her support during her lifetime, or widowhood, at which period it goes to such of my children as she may direct the real and personal."

It really is difficult to see what the testator meant by that, when we find that the property which he lived on was lots 11 and 12 and part of 13, in the first concession of Augusta, which very lands he afterwards, in the same will, devised to his son James Campbell, his heirs and assigns forever, not noticing even the life estate which he had given in one-third of the same lands to his widow. The will, it is evident, was not drawn by a lawyer, and whoever did draw it seems to have forgotten, while he was writing one part of it, what he had written in another part. The intention, perhaps, was, that the widow should have, during her life, the enjoyment of one-third of the lands last mentioned and of the personal property, such as stock, farming utensils, &c., held with them, and should have the power of disposing of the same among her children, to be enjoyed after her death; in which case all that can be said is, that the absolute devise of the whole of the lands in fee to his son James Campbell is inconsistent, as far as respects the third thus devised to the widow for life, with power of disposal over—in regard to which disposal over there is a singular inaccuracy, for the words of the will are, that the equal third of the property which the testator lived on is to go to the widow for her support during her lifetime or widowhood, *at* which period (instead of *after* which period) it is to go to such child as she should direct.

But then follow—in the same seventh clause in which the west half of 12, in the second concession (the land now in question), is divided, and at the very end of that devise—these words, “to have and to hold the above described land, as before described, with every appurtenance thereunto belonging, *unto my said wife, her heirs and assigns forever.*” According to a general principle of construction, these words, from their position at the end of the clause, would control the whole; but they may be restrained, in this case, from affecting the property the testator lived on, by reason of the repugnancy which such an application of them would create between the limitation in fee and the restricted estate given in this property by the words immediately preceding, as well as the subsequent disposition of the same property

to James Campbell. We avoid this repugnancy by applying the limitation in fee at the end of the seventh clause only to the lands "*described above*" in that clause, which are lots 13 and the west half of 12, in the second concession of Augusta. In doing this we follow the very words of the will, and by this construction the widow takes these lands "*in like manner*" as she was to take the land previously devised; so that a sensible meaning is given to these words which would otherwise have no meaning, and a sensible meaning is also given to the words, "to hold the above described lands as before described," which would otherwise have nothing clear to operate upon; and the repugnancy is also avoided of holding the same estate to be devised in the same sentence, by one set of words, to the widow in fee, and by another set of words, to hold for life only, with power of disposal.

It is not necessary, we think, in this case, to resort to the rule which would make the concluding words of the seventh clause prevail over the previous words, as being the last in the will; and which, on the authority of many decisions would compel us to hold that the widow took a fee, even if we saw an inevitable repugnance; for I believe that the natural reading of the clause leads to the same conclusion, and that it is only the equal third of the homestead which the testator meant should go to the widow for life, with power of disposal; and that the 300 acres in the second concession were to go to her in fee, in like manner as the other lands had been devised to her. It is a strong circumstance in favour of this construction, that the parties interested, who most probably must have known the intention of the testator, seem to have adopted, and acted upon it for years.

Rule discharged.

HEDDEN V. GREGORY ET AL.

Recognizance of bail to the limits, how forfeited.

Where a defendant on bail to the limits has broken his recognizance, it is no defence that he was informed, and believed that the place he went to was within his limits, unless it can be shewn that such was the general impression, or that the boundary was disputed.

Debt on a recognizance of bail to the limits, entered into by the defendants as bail for one Eli Gregory, in custody on a *ca. sa.* at the suit of this plaintiff: the condition of which recognizance was, that Eli Gregory should remain and abide at the suit of the said plaintiff, within the limits of the gaol of the united counties of Lincoln and Welland, and should not depart therefrom unless released by due course of law, and should obey all notices, orders, and rules, &c.—(according to the terms prescribed by the statute for such recognizance); and the plaintiff averred that Eli Gregory did not remain and abide within the limits of the gaol of the united counties, &c., but, contrary to the said recognizance, departed therefrom, without being released by due course of law or otherwise; the debt, &c., being wholly unsatisfied; whereby an action had accrued, &c.

The defendant pleaded that the said Eli Gregory did remain and abide within the limits of the gaol, &c., and did not depart therefrom as the plaintiff had in his declaration alleged.

At the trial before Draper, J., at Niagara, the plaintiff proved that Eli Gregory had gone to the house of his brother-in-law, one Wardell, who lived in the township of Moulton, which is in the county of Haldimand, and had stayed there all night, and returned the next day to the county of Welland.

The defendants gave evidence to prove that Eli Gregory had been informed that Wardell's house was in Wainfleet, which borders upon Moulton, and is in the county of Welland, and his defence was, that he was really under that impression, and went beyond the limits undesignedly.

The learned judge held that to be no defence under the plea pleaded, and told the jury that the plaintiff was entitled to their verdict for the debt and costs for which Eli Gregory had been detained. They found, however, for the defendant.

Boomer moved for a new trial, without costs, on the ground that the verdict was against law, and was rendered against the judge's charge.

W. Eccles shewed cause ; he relied on *Lewis v. Grant*, 1 U. C. R. 290.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule must be made absolute.

It was laying a very undue stress upon anything said by the court in *Lewis v. Grant*, to rely upon it as supporting the defendants' plea in this case, which denies that the debtor departed from the limits. The learned judge refused to give way to it, as an authority to that extent—and we think very properly. The circumstances of the two cases are wholly different. There, if the debtor went beyond the limits at all, which was by no means clearly made out, it was only in consequence of his being under the impression that generally prevailed as to the actual bounds of the town. Here there is no pretence for raising a doubt that the debtor did leave the county of Welland, and go into the county of Haldimand, and spend a night there ; and we can not admit that because his brother told him he thought *Wardell* still lived in the county of Welland, he was under no necessity to enquire further. We could never tell in such a case whether the ignorance of what everybody else knew was real or effected, and it is difficult to believe that the debtor would spend an afternoon and night at *Wardell's*, and not become aware of what township he lived in. There was no doubtful question of boundary in this case.

New trial, without costs.

PARIS AND DUNDAS ROAD COMPANY V. BABCOCK.

Carriages conveying the mail are not exempted from payment of tolls.

This was an action brought by the plaintiffs,—as incorporated under the provisions of the act 12 Vic. ch. 84, authorizing the formation of joint stock companies for the construction of roads, and the several amendments thereto,—to recover tolls from the defendant, for the use of their road by his carriages and stage-coaches.

Plea—*Non-assumpsit*.

It was admitted that the defendant had used the road as alleged ; that he was contractor by agreement made with the post-office department since the transfer thereof to the provincial government, for the conveyance of Her Majesty's mails ; and that his coaches conveying such mails had passed along the plaintiffs' road and through their toll-gates without paying toll, although demanded.

It was submitted for the opinion of the court whether he was by law exempted from such payment or liability in consequence of being such mail contractor.

Cameron, Q. C., for the plaintiffs.

J. Duggan, for defendant.

The statutes referred to are noticed in the judgments.

ROBINSON, C. J.—These plaintiffs are incorporated under the provision of an act of this province, 12 Vic. ch. 84 ; amended by 13 & 14 Vic. ch. 72, and 14 & 15 Vic. ch. 122. The 15th and 20th clauses of the first act give a general power to any company formed under that act for making a road to impose tolls, "to be received from all persons passing and repassing with horses, carts, carriages, and other vehicles," on and along any road so made by them.

The 33rd clause exempts from toll "all persons, horses, or carriages going to, or returning from funerals, or going to or returning from divine service on the Lord's day." I find no other exemption in it. The two amending acts contain nothing that can affect this question ; for, though the third clause of 14 & 15 Vic. ch. 122, relates to tolls, it does not, as regards the point submitted to us, contain anything that calls for notice.

The defendant, it is admitted, has passed along this road with carriages and horses, while tolls were payable to the plaintiffs under authority of the 12th Vic. ch. 84,—he is therefore *prima facie* liable to pay tolls, and must shew some clear ground of exemption, if he claims to be exempt.

There certainly is nothing in any of the three statutes which relate to this company to exempt him ; and the question seems reduced to this, whether there is anything in the other statute law of this province, or anything

remaining in force in this province of any British or Imperial act of parliament which has that effect. The contractor for the mails, I take it, can claim no exemption unless under some positive law.

Then, first, as to the statute law of this province: no such exemption has been pointed out to us as being contained in any general highway act of this province, and I have found none.

The defendant relies upon what is to be found in the Post Office Act, 13 & 14 Vic. ch. 17. The amending act 14 & 15 Vic. ch. 71, contains nothing material to be referred to. In the first act, the 7th, 16th, and 24th clauses are to be considered. The seventh clause repeals any previous enactment which obliged ferrymen to transport any mail across ferries without remuneration, and provides that they shall receive an allowance to be fixed by contract. That indicates a disposition in parliament to deal liberally, if we should not rather call it justly, with those who are put to trouble or expense in assisting in forwarding the mails. Ferrymen, it is true, have a laborious duty to perform, and it may be argued that that distinguishes their case from that of the owners of a highway, over which the carriage conveying the mail is merely allowed to pass. The answer to this however, is, that the road in the case before us has been constructed at the expense of the proprietors, who have no greater interest in the mail than the other inhabitants of the province; that the use of the road by carriages and horses transporting the mail, helps to wear it out; that plank roads especially are far from durable; and that the difference between their case and that of ferrymen supplies only an argument that may apply to the *quantum* of charge not to support a total exemption. The 24th clause is only material, as it provides that the term "mail" shall include every conveyance by which post letters are carried, whether by land or by water.

It is on the 16th clause of this provincial statute that the chief stress is laid by the defendant. This clause makes it a misdemeanor for any "toll-gate keeper to refuse or neglect upon demand to allow any mail, or any carriage, horse, or

animal employed in conveying the same, to pass through such toll-gate, whether on pretence of the non-payment of any toll, or any other; provided that nothing herein shall affect the right of any officer or person travelling with any mail to pass toll free through any toll-gate, but in any case where such officer or person would now pass toll free, an officer or person in travelling with a mail after the passing of this act shall in like manner pass toll free, but not otherwise, or elsewhere, unless it be otherwise provided by competent authority; but in any case he shall not be detained on pretence of demanding toll, but the same, if due and not paid, shall be recoverable in the usual course of law from the party liable."

It is not shewn to us that any "competent authority" has made any provision on this subject since this act was passed; and my opinion upon it is, that it established no exemption in favour of persons conveying the mail, by reason of anything that this act contains, or that I find to have been enacted in any other of our provincial statutes. It leaves us, so far as I can see, only to enquire whether there is any enactment in a British act of parliament in force in this province which creates the exemption claimed.

I have looked over the collection of post-office statutes with which we were furnished by Mr. Duggan—they shew that, in various turnpike acts in England, there were clauses exempting from tolls horses and carriages employed in carrying the mails, which are all now repealed, in order to consolidate all provisions upon that subject into three general statutes.

The Imperial act, 1 Vic. chap. 36, sec. 10, exempts persons travelling with the mail in North America from paying for ferryage; this was only preserving a clause that had formed a part of an early post office act, 9 Anne, ch. 10, sec. 29, passed at a time when there were probably few, if any turnpike roads in British North America. If this, or any other of these early post offices acts, did contain any clauses exempting from toll on turnpike roads, which I do not find to have been the case, the Imperial parliament on this occasion dropped it, which would afford an argument in favor of the present plaintiffs' claim.

I have examined the post office consolidations acts passed in England in 1837, 1 Vic. chaps. 32, 33, 34, 35, and 36.

The 18th and 19th clauses of ch. 32 shew that, as regards the different parts of the United Kingdom, it had been by no means the rule that carriages conveying the mail were to pay no tolls on turnpike roads; and that act while it relieves the mail from the inconvenience of being retarded by having to pay toll at the gate, does not shew that in the United Kingdom parliament thought it right to insist upon an immunity from charge: on the contrary, the language of the 18th clause recognizes that tolls on carriages conveying the mails may be by law *chargeable*, and only guard against their being exacted and enforced in a manner that may retard the passage of the mail. And, although that statute provided expressly for the management of the post office in all her Majesty's dominions and territories, (the Imperial Government retaining at that time the entire control of the post office department in the colonies,) yet it makes no provision on the subject of paying tolls that can be applied to this province or anywhere out of the United Kingdom.

The statutes 1 Vic. chaps. 34 & 35 have nothing in them bearing on the present question; they relate only to rates of postage, and the privilege of franking.

In ch. 36, secs. 9, 10, and 12, there are provisions which seem rather at variance with secs. 18 and 19 of ch. 33, if they mean that nothing shall be paid on account of toll in the shape of allowance or otherwise, by the post office superintendent. The 9th clause, in its language no doubt seemed to go further than was necessary merely for guarding against the mail being retarded by demand of toll at the gate. But when we consider that this statute and ch. 33 were passed on the same day, it seems impossible that anything more than that can have been meant—even in regard to England, Ireland, and Scotland—because if more were meant by this clause, then these several statutes, all passed on the same day, would be repugnant to each other.

But then comes the Imperial statute 12 & 13 Vic. ch. 66, which conceded to the colonial legislature the power

of "making such provisions as they may think fit, for and concerning the establishment, maintenance, and regulation of posts, or post communications within the colonies respectively"—such acts, however, not to take effect unless assented to by her Majesty with the advice of her Privy Council, nor until such assent shall be proclaimed in the colony. On considering the first clause of our provincial act, passed under the authority of this statute, I think it shews that the legislature has declared in effect, that when this statute comes into force, all regulations of the post established by Imperial acts shall cease to be in force in this province, or such of them at least in regard to which provision is made by this act.

Then we must look at the 7th and 16th clauses of this provincial statute, and see whether they make any provision in the matter which we are considering such as must displace any enactment then existing in an Imperial statute, under which this defendant could have claimed exemption. The 7th clause is so far material that it seems to shew the sense of the legislature, that when this act of theirs should come into force, any law which had exempted mail carriers from paying toll at ferries in this province would be still in force until they repealed it; and that not choosing that exemption to continue, they did repeal it. But neither that nor any other clause of this act relates to tolls on roads in this province, except the 16th clause; and the consideration of this clause brings me round again to the point from whence I departed—namely, whether, at the time this statute, 13 & 14 Vic., ch. 17, came into force, a person carrying the mail in this province could pass toll free under the enactment of any Imperial statute. I say under the enactment of any Imperial statute, because, although the saving in this 16th clause is not limited to exemptions created by British or Imperial acts, yet as we find no exemption in our own statute book, we have only to look to those acts.

This throws us back again on the 1 Vic., ch. 36, sec. 9, which it is necessary to consider more particularly; and I confess the intended scope of that statute does not seem

clear to me. It is intituled, "An act for consolidating the laws relative to offences against the post office of the United Kingdom, and for regulating the judicial administration of the post office laws, and for explaining certain terms and expressions employed in those laws:" and from the fact of Parliament, in their repealing act (chapter 32), passed at the same time, having exempted from repeal those parts of the old statutes 5 Geo. III., ch. 25, and 7 Geo. III., ch. 50, which related to offences committed against the post office within the colonies, I should have thought that they did not intend this statute to apply beyond the United Kingdom if there were not in the 10th and 12th clauses something inconsistent with that application, and in the 4th clause a clear declaration that the act shall extend to, and be in force in the colonies. As it is, however, I see in the act so many, and such evident proofs that England, Ireland, and Scotland, were alone in view, and not the colonies, in regard to its provisions generally, and I believe whoever framed it had the United Kingdom alone in his mind, except in those parts where the colonies are expressly mentioned. If we read the act attentively through, we shall see many clauses in which the language is unrestricted, and which it is nevertheless evident were not intended to be applied to the colonies, because, if they were, then we should have two bodies of criminal law in relation to the same offences, imposed by statutes passed by the same legislature, on the same day—namely the penal enactments in 5 and 7 Geo. III expressly retained in force by 1 Vic. ch. 32; and the penal enactments contained in 1 Vic. ch. 36. Whatever may have been meant by the 9th clause, taken into consideration with the 18th and 19th clauses of ch. 33, passed on the same day, so far as all these enactments apply to the United Kingdom I cannot say that that 9th clause has any application to the transportation of the mails on roads out of the United Kingdom. The 10th clause undoubtedly does expressly apply to the North American Colonies, but it relates only to ferries.

So that I come to the conclusion that there was not, when our statute 13 & 14 Vic. ch. 17 passed, and is not now, any exemption from toll under any British act of parliament, in

favour of persons carrying the mail in this province, and that there being no positive law to that effect, the general provisions of the plaintiffs' act of incorporation entitles them to charge the tolls in question.

There is nothing in the claim unreasonable or disrespectful, as regards the public service. There is no toll charged on the person in charge of the mail or on the mail itself. The question is, whether horses and carriages which transport the mail, and which may, for all we know, be at the same time transporting passengers and merchandize for hire shall go free, because the mail is in the carriage. The legislature may think it right to make such provision, and if they do, they will probably accompany it by some such restrictions as the 18th and 19th clauses of 1 Vic. ch. 33, apply to the United Kingdom, but at present I do not see clear authority for the exemption. There is none, unless it be the 9th clause of ch. 36, and I think that does not extend to this colony, and if this case turned upon the question whether the contractor carrying the mail is necessarily to be regarded as a person in her Majesty's service, and his carriage as a carriage employed in her Majesty's service, because the mail was transported in it, my impression at present is, that the case of *Hamilton v. Stow* (5 B. Al. 649), which is a decision upon that point, is very distinguishable from the case before us, by reason of the difference of circumstances; but on the other grounds that I have stated, my opinion is, that the plaintiffs are entitled to recover.

I have seen the judgment delivered in the Court of Common Pleas, in this province, in the case of *Leslie v. Miller and Thompson*. As regards the position of the plaintiffs in these two cases, there seems to be no difference that should distinguish the one case from the other. The question turned there, as it does here, upon the point whether, by the general law, stage proprietors can claim an exemption from toll on account of the mail being conveyed in their carriages. A majority of the learned judges of the Common Pleas thought the 9th sec. of the 1 Vic., ch. 36, established necessarily an exemption from toll; but the opinion was not unanimous. Our Post Office Act, 13 & 14 Vic., ch. 17. has so far affected the question, that it shews that the

legislature did not by any means assume that a prohibition against enforcing payment of toll at the gate by such words as are contained in the 1 Vic., ch. 33, section 9, was equivalent to conferring an exemption from toll. On the contrary, they seem to admit that a right to toll in such cases may have existed in this province notwithstanding anything contained in the 9th clause of 1 Vic., ch. 36. And they have made a provision, by the 16th clause of the colonial statute, expressly founded upon that assumption. This seems to me to diminish the force of the reasoning on which the judgment in *Leslie v. Miller. et al.* was founded, so far as to leave it doubtful whether the court, if they had had to deal with the question under the same circumstances as we have, might not have come to a different conclusion.

According to the best judgment I can form on the question, the plaintiffs in the case before us are entitled to recover.

BURNS, J.—The main point to be decided in this case, as it appears to me, is, whether the provisions of the 9th section of 1 Vic., ch. 36 (Imperial act) are applicable to exempt horses and carriages belonging to persons employed in carrying the mails from paying toll, while the same are so employed upon the turnpike roads of this province. I must say it appears to me very plain that the provisions of that section can have no such application to exempt the horses and carriages so employed upon our roads, but that the provisions are intended to apply to the roads of the United Kingdom. Two reasons combined appear to me conclusively to establish that such provisions were never intended to operate beyond the limits of the United Kingdom, so as to exempt from payment of toll, if such toll were in other respects legal. First, the 9th section contains provisions of forfeiture of 5*l.* against any ferrymen or other person employed to receive the tolls or rates at a ferry who, shall demand any toll of such person, &c., or who shall not within the space of fifteen minutes after demand made convey the mail across such ferry to the usual landing place; as well as a similar penalty upon every toll collector at a turnpike gate. The 10th section provides the like

penalty of 5*l.* upon any ferryman within any of her Majesty's colonies or provinces in North America, who shall not on demand convey over any deputy officer or agent of the post-master-general travelling with a mail, and such deputy officer or agent shall not be liable to pay for passing or repassing. If the 9th section had the extended operation of applying to the North American Colonies, there was little use in adding the 10th section, unless it be that that the 10th altogether exempted the payment of tolls at ferries in North America, and that the effect of the 9th section was to guard against any delay of the mail at a turnpike gate, leaving the proprietors of the horses and carriages liable to the payment. It is possible the two sections may be reconcileable with each other in that point of view, but if not, then to a certain extent there is a double provision for the same objects—the one general and embracing all her Majesty's dominions, the other for the same purpose confined to the North American Colonies. To adopt the view of reconciling the two sections in the way I have mentioned will not answer the defendant's purpose, for he argues that if the toll be not demandable at the gate, it is not demandable at all, and therefore he has a right to pass free with his horses and carriages while carrying the mail. If the defendant's argument be sound, then clearly there was no necessity for the 10th section; and if toll could not be collected because no demandable at the gate or ferry, there was no necessity for enacting that the deputy officer or agent travelling with the mail should not be liable for passing or repassing. It can scarcely be supposed, I should think, that the 10th section was enacted following the 9th *ex abundanti*, if it meant the same thing: that is, either equivalent to it in its fullest extent, or embracing the same matter to a lesser extent. If the 10th section be wider in its operation, then it can only be reconcileable in the way I have mentioned, and in that case the plaintiffs would have a right to maintain this action. I feel convinced that the 9th section was not intended to apply out of the United Kingdom, so far as to exempt the payment of toll on the turnpike roads, if by law the horses and carriages employed

in carrying the mails would be otherwise liable to pay toll, for the second reason I now give.

The act 1 Vic., ch. 36 is entitled "an act for consolidating the laws relative to offences against the post office of the United Kingdom, and for regulating the judicial administration of the post office laws, and for explaining certain terms and expressions employed in those laws." In order to carry out what the British parliament intended in respect to the post office department, a series of acts were passed at the same time. The first, ch. 32, is an act for repealing the several laws then in force relating to the post office. In the consideration of this question it is important to see what laws were thereby repealed applicable to this subject, for that will enable us to see why provisions were introduced into these new laws, and how and in what manner we should apply them. We find that so much of the act 3 Geo. IV. chap. 126, entitled "An act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England" as relates to exemption of horses and carriages employed or to be employed in carrying the mails and expresses from the payment of tolls, is repealed; and likewise so much of the act 4 Geo. IV. ch. 49, which was an act for regulating the turnpike road in Scotland, as related to the same subject. The next act of the series is chap. 33, intituled "An act for the management of the post office," and this act, section 18, provides, that in order that the progress of the mail may not be retarded by the demand of toll at the gates or places where tolls are chargeable on horses and carriages passing such places, no person shall demand such toll, but in Scotland the toll shall be paid out of the revenue of the post office in Scotland, at such time and in such manner as may be agreed upon between the several trustees entitled to receive the same and her Majesty's postmaster general; and in Ireland the postmaster-general shall cause an account to be kept, and pay the same quarterly. By the 19th section, no toll shall in England be demanded or taken on any turnpike road for any horses or carriages, of whatever description employed, in carrying

mails or expresses under the authority of the postmaster-general. In this act there is no provision for turnpike road, out of the United Kingdom, and the three portions of the United Kingdom are specially named and provisions for. The next, ch. 34, is "An act for the regulation of the duties of postage" and ch. 35, is "An act for regulating the sending and receiving of letters and parcels by the post, free from the duty of postage." Then follows ch. 36 upon which the present question arises; and, as appears from its title, it is merely auxiliary to the others, and for the purpose of regulating the judicial administration of the post office laws, and explaining the terms and expressions used in those laws. There was, of course, a necessity for making provisions in lieu of those repealed which applied to the turnpike roads of the United Kingdom, and the position of those roads was present to the view of the legislature, but I see nothing upon the acts which can lead me to the conclusion that the turnpike roads of the colonies were thought of or intended to be provided for. That the North American Colonies contained rivers which would require to be crossed, was apparent, and therefore the 10th section is a complete enactment of itself with respect to the ferries, and it requires not to be read in conjunction with any other clause or act, in order to give it force and complete effect, even to the mode in which the forfeiture or penalty shall be recovered. The 9th section cannot be so treated, but requires the aid of other sections of the act, and also a reference to the other acts, in order to understand its full force and meaning. In Scotland the 9th section could not be construed as an entire exemption from toll, because the 18th sec. of ch. 33, provided that the toll should be paid: and, therefore, in that country the 9th section would only receive the construction of being a provision to guard against the mail being delayed. So it would receive a similar construction in Ireland. If the construction which the defendant contends for be true, then it differs in this country from what it would be in Scotland and Ireland. Then, what would be the construction of the 9th section; when applied to England? If the construction which is now contended for on the part of the defendants, as applicable to

the colonies, be the true construction, it may be asked where was the necessity for the provisions the 19th section of ch. 33, to exempt the horses and carriages from toll on the English turnpike roads? This last section expresses the reason for exempting the horses and carriages on the English roads to be that the charges of the post office may not be unnecessarily increased by the addition of other charges of a public nature. The 9th section of ch. 36 could not have been introduced, supposing what is contended for to be its true construction, *ex abundanti*, so far as England was concerned; and in Scotland and Ireland it could not receive the construction that it exempted altogether from payment of toll. The true construction, therefore, to give to the 9th section as I think, is, that it is a provision against delaying the mails; and in that respect it will apply everywhere; and such construction is not inconsistent with any of the provisions contained in any of the acts, but it is just as applicable in England, where the right to toll was abolished, as in Scotland and Ireland, where the payment was provided for, as it would be in the colonies, where nothing is said about the payment of tolls. In England, the right to tolls was taken away; in Scotland and Ireland, the payment of the tolls was specially provided for; and, as I read the acts, the colonies were not provided for at all in respect to the turnpike roads. Those who framed the post office acts could scarcely be supposed to know anything of the state of our roads: but they knew that a vast country like North America could not be without rivers; and they chose to provide for crossing these free, but left the roads unprovided for—merely providing that her Majesty's mail should not be delayed.

I have not thought it necessary to consider the effect of our own post office laws, or our road acts, as bearing upon the question; for I am of opinion that there is nothing in the English acts, upon which the question was rested in the argument, which justifies the conclusion that the operation of the 9th section of chapter 36 is such as to exempt the proprietors of horses and carriages employed in conveying the mail from paying toll in this country.

DRAPER, J., concurred.

Judgment for plaintiffs.

MILLER V. HOUGHTON.

Slander—*Held* that the declaration charged a good cause of action, and with sufficient certainty.

SLANDER.—At the trial, at Simcoe, before Sullivan, J., the plaintiff confined himself to the third count. The words in this were—"It's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to barish the young baker." There was proper prefatory matter stated in this count by way of inducement, and inuendoes averring that the meaning and intention of the words were, to charge the plaintiff with taking medicine to procure abortion.

The jury gave a verdict for the plaintiff, and 100*l.* damages.

Miller moved for a new trial or a *nonsuit*, or to arrest the judgment.

Cur adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

We see no ground for the rule—certainly not in the evidence—for the words were proved and the inuendoes; but the learned judge seemed to be of opinion at the trial that the declaration did not charge a substantially good cause of action, thinking that the words imputed no crime, but a mere *intention* to commit a crime.

We think, however, that there is no difficulty of that kind. The inuendoes are self-evident. The words carry plainly the meaning ascribed to them—that the plaintiff had been taking medicine to procure abortion, and had kept the house in consequence of having done so. To suppose the defendant to have meant that she stayed all winter in the house, because she intended to take medicine and not because she was taking it, would be a forced construction; and besides, the words plainly import that she had been taking medicine. The count also appears to us to lay a good cause of action. The damages may seem high, considering the station of life of the parties; but on the other hand, the imputation is one very seriously affecting the character of the plaintiff, and the defendant seems to have been persevering in advancing the accusation.

Rule refused.

MILLER V. DARROW.

The evidence given by the plaintiff in this case was not a sufficient compliance with the usual undertaking on changing the venue.

TROVER for a pair of horses, harness, and a pair of truck wheels.

The plaintiff was under terms of giving material evidence in the county of Oxford, having brought back the *venue* to that county upon the usual undertaking.

At the trial, at Woodstock, before Sullivan, J., the evidence on which the plaintiff relied, as being a compliance with his undertaking was this—

The defendant had obtained the property by purchase from one Smith, in the plaintiff's absence, and he bought under the assumption or the pretence that Smith was a partner of the plaintiff, and had a right as such to dispose of the property. All the facts in the case took place in the county of Norfolk. But the plaintiff's attorney gave evidence that the plaintiff and Smith, before this action brought, and before the alleged conversion, came into the county of Oxford: that he, the plaintiff's attorney, talked with the plaintiff in presence of Smith of the business the plaintiff was doing in the county of Norfolk, and in the course of conversation asked him if any one was in business with him and he said "No"; and that Smith told him that he was assisting the plaintiff.

The learned judge held that this was not evidence within the plaintiff's undertaking and nonsuited him.

D. G. Miller moved to set the nonsuit aside, or for a new trial. He referred to *Watkins v. Towers*, 2 T. R. 275; *Stancliffe v. Clarke*, 9 Eng. R. 492.

Cur. adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

The questions are—1. Whether this was legal evidence at all; and 2. Whether it was such evidence as comes within the undertaking, so as to form a compliance with it.

We are of opinion that the evidence relied upon did not amount to compliance with plaintiff's undertaking to give material evidence of some matter within the county of

Oxford, and that the nonsuit therefore was proper. The plaintiff's case rested on evidence of his own right of property and the defendant's conversion. He cannot be supposed, when he brought his action, to have known that the defendant on the trial would endeavor to prove that Smith, who, the plaintiff alleges, was merely his servant, took upon himself to dispose of his property as if he were his partner. The conversation in Smith's presence had no relation whatever to the facts of this case, and was not itself in any sense a fact in issue. It was in truth, not legal evidence at all, for Smith's tacit, or express admission that he was not a partner, was not evidence, not being under oath, and no reason being shewn for not producing him, if he could prove anything material. What is contended for here is, that the plaintiff in an action of *tort* can remove the suit from the proper county, not in order to give evidence of any one fact arising in the other county, on which his declaration could have been founded, but merely of a conversation casually taking place there, upon a point having no reference to the facts of the case, but which may have some effect in repelling a defence that may possibly be set up. We are satisfied that this cannot be deemed a compliance with the plaintiff's undertaking.

Rule refused (a).

REYNOLDS V. ALLAN.

The evidence given in this case shewed a sufficient tender.

Assumpsit on the common counts.

Pleas—General issue, and a tender before action brought as to part of the demand.

Application denying the tender.

At the trial, at Woodstock, before Sullivan, J., the evidence of the tender was, that on the 8th of February, 1851, Grant, Bradley, and McDermot, went by desire of the defendant, to make a tender to the plaintiff of the above sum; that the defendant had counted out the money to Grant, who gave it to Bradley. When he saw the plaintiff, Grant told him he had come to pay him that sum, on behalf, of Allan the

(a) See *Howe v. Pike*, 4 Ex. 495; 1 Saund. 74 a note d.

defendant—naming it, but not holding the money exposed in his hand. The plaintiff said he would not accept it, for that his demand was larger than that. The offer was repeated, and was in the same manner refused. Bradley had counted the money also, before he went there, and was standing by at the time, and heard the tender made, and the plaintiff's refusal, having the money in his pocket ready to produce if the plaintiff had not declined taking it.

It was objected that this was no tender. The learned judge told the jury if they were satisfied that the plaintiff waived the production of the money by rejecting it unequivocally, it was of no consequence which of the persons who all went there for the purpose of making the tender had the money in his pocket.

A verdict was thereupon given for the defendant.

Galt moved for a new trial upon the law and evidence, and for misdirection. He referred to *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Dickinson v. Shee*, 4 Esp. 68; *Thomas v. Evans*, 10 East. 101; *Powney v. Blomberg*, 8 Jur. 746.

Cur. adv. vult.

ROBINSON, C. J.—We think the tender was clearly sufficient, and that the rule must be refused.

Per Cur.—Rule refused (a).

BOULTON ET AL. V. SHAND.

Trespass—Evidence—Title.

When in an action of trespass, the plaintiffs at first relied upon a paper title which turned out to be defective, they were afterwards allowed to give additional evidence of possession, and go to the jury upon that.

This was an action of trespass, tried before Sullivan, J., at Cobourg.

Pleas—"Not guilty," and "not possessed," besides a special plea of justification. The plaintiffs at first relied on their title under certain deeds, about which several questions arose depending on the evidence, and not material to be reported. After they had given their proof connected with this title, which appeared to be defective, they offered

(a) See *Cheminant v. Thornton*, 2 C. & P. 50; *Harding v. Davies*, *Ib.* 77; *Reed v. Goldring*, 2 M. & S. 86; *Glasscott v. Day*, 5 Esp. 48; *Black v. Smith*, *Pea.* 88; *Kraus v. Arnold*, 7 Moore, 59.

additional evidence of possession; this was objected to on the part of the defendant, but admitted by the learned judge, who told the jury that in this action of trespass the plaintiffs could stand upon their peaceable possession alone against a wrong-doer, and he left the proof of possession to the jury, telling them that if they were satisfied with that evidence, the defendant was then driven to defend himself under his pleas which justified the entry.

The jury found their verdict for the plaintiff.

Vankoughnet, Q. C., moved for a new trial on the law and evidence, and for misdirection and for the reception of improper evidence. He cited *Doe dem. Woodhouse v. Powell*, 8 Q. B. 576.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think there is no difficulty in this case, on account of the learned judge at the trial having allowed the plaintiffs to go to the jury upon their possession alone, after they had given evidence of a title in which he thought there was a defect. The case was cited of *Doe dem. Woodhouse v. Powell*, was an ejectment, where the party could not recover except upon proof that he had a legal title to the possession; and when he shewed what his title was, and that it was imperfect, the court would not entertain the presumption of a legal seizin from the mere fact of possession, because he had himself connected that possession with a title which appeared to be defective, and so had not left room for entertaining the presumption which might otherwise have arisen. I say this without remarking further on the case of *Doe dem. Woodhouse v. Powell*, though I venture to say with deference, that I expect to find the soundness of that decision questioned, if it shall come hereafter into discussion.

In the case before us the plaintiffs are suing in trespass, and it is clear that upon the pleas of "Not guilty," and "not possessed" they are entitled to succeed when they shew themselves to have been peaceably in possession when the act complained of was committed, and when the defendant shews no better right either in himself or in some person under whose authority he entered. The existence

of a better right in a stranger, between whom and the defendant there was no privity, would signify nothing; nor is an apparent defect in the plaintiffs' title any objection to their recovery. And, as to the learned judge admitting additional evidence of the plaintiffs' possession in a late stage of the cause, that is matter of discretion at the trial, and it would be idle to over-rule the exercise of that discretion, and grant a new trial on that ground, merely to let the evidence be taken at an earlier stage on the next trial (a).

The verdict was warranted by the evidence, and we see no reason for disturbing it.

Rule refused.

BROWN ET AL. V. THE GORE DISTRICT MUTUAL INSURANCE COMPANY.

Mutual Insurance Company—6 Wm. IV. chap. 18, sec. 2—Statement of title.

The defendants, in applying for an insurance with the plaintiffs, had represented themselves as owners of an unincumbered estate in fee-simple in the premises to be insured. It appeared that they were interested only as mortgagees in fee, and for a less sum than that insured for.

Held that they had not represented their title truly, as the statute requires, and that they could not recover on the policy.

COVENANT on a policy of insurance, by which the defendants promised to pay all losses not exceeding 200*l.*, which might happen by means of fire, to certain premises insured with them by the plaintiffs.

The defendants are incorporated under the act 6 Wm. IV., chap. 18, to authorize the establishment of mutual insurance companies. The 17th clause enacts that the policies shall be binding on the company "in all cases where the assured has a title in fee-simple unincumbered to the building insured, and to the land covered by the same; but if the assured have a less estate therein, or the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrance on the premises be expressed therein, and in the application therefor."

The plaintiffs' application stated that they were owners in fee, and that the premises were not incumbered.

(a) See on this point *Robinson v. Rapelje*, 4 U. C. R. 289.

At the trial, at Woodstock, before Draper, J., it appeared that the plaintiffs were assignees of the mortgage on the premises in question, given by one Brooks to J. C. for 66*l.* 5*s.*; and that they held a subsequent mortgage from Brooks to themselves, for 84*l.* 3*s.*

A verdict was directed for the plaintiffs for 212*l.* by consent, with leave to the defendants to move to enter a nonsuit, or a verdict for them.

The case was however, by consent, set down to be argued as special case.

Galt and D. G. Miller, for the plaintiffs, cited *Simpson v. Smyth*, 2 O. S. 129, (in appeal); *Doe dem. Hodsdon v. Staple*, 2 T. R. 695; *Shannon v. Breadstreet* 1 Sch. & Lef. 67.

Read, contra, cited *Geach v. Scott*, 14 M. & W. 95; *Newcastle Fire Insurance Company v. McMorran*, 3 Dow. 255; *Maberley v. Robins*, 5 Taunt. 625; *Doe dem. Cadwalader v. Price*, 11 Jur. 131.

DRAPER, J., delivered the judgment of the court.

It appears to me too plain for argument that the plaintiffs in this case must fail. It cannot be said that they had a title in fee simple unincumbered; and this they professed to have by their statements in their application to insure. If they could recover on this state of facts, they would be equally entitled to recover though their mortgages were originally only intended and expressed to secure 10*l.*, or though all the moneys, except 10*l.*, or any smaller sum, had been paid upon the mortgages. The contract of insurance is said to be *uberrimæ fidei*: if the plaintiff's doctrine could prevail, it would be of the very opposite character.

We are of opinion that the verdict should be entered for the defendant.

Judgment for defendant.

RIDLEY V. LAMB.

Waggon left in the Highway—Liability.

When a waggon is left standing in the highway, the owner cannot exempt himself from liability by shewing that the person injured thereby was drunk at the time of the accident.

Case for negligently leaving a waggon of defendant in the highway. *Plea*—General issue. The plaintiff ran his

horse at night against the waggon, and the pole protruding towards the centre of the road went into the breast of the plaintiff's horse and killed him.

At the trial, at London, before McLean, J., the jury found for the plaintiff, and 20*l.* damages.

Ross moved for a new trial on the law and evidence and for misdirection.

The facts of the case more fully appear in the judgment. *Our adv. vult.*

ROBINSON, C. J., delivered the judgment of the court.

At the trial the defendant attempted to shew that the plaintiff was drunk at the time, and that if he had not been so, and had driven with ordinary care, although it was night, and rather dark, he might have avoided the accident.

It seems that the plaintiff had been drinking, but the loaded waggon of the defendant was left very improperly standing on the side of the road, between the gravelled part of the road and the ditch, near a tavern at which the plaintiff intended to stop, and in driving past the inn to the shed the waggon stood on the road, so that a person might pass on either side of it to the shed, which shews that that was an improper position in which to leave it,—especially with the pole projecting rather toward the centre of the road and standing up about breast high to a horse. The accident happened at night. The fact that the horse ran against the pole is a circumstance leading strongly to the conclusion that a person happening to drive in that direction was not likely with common care, to avoid it, for it is seldom that a horse can be forced upon anything of this kind, when he has light enough to see it plainly; and if the horse did not perceive it, it is very probable that a sober man might equally have failed to notice it before it was too late.

The leaving a waggon in the highway, in so public a situation, was a gross act of imprudence. The defendant seems to have been conscious of that, for he offered afterwards to compensate the plaintiff, but would not agree to give what the plaintiff thought reasonable. The fact too of others having nearly met with a similar accident,

and being probably saved by some one crying out to warn them, is in favor of the plaintiff's case.

It cannot be permitted to a person to place any obstruction that he pleases in the highway, and to consider himself responsible for no injury that may happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no reason to expect to find there. A man might as well dig a ditch across the highway and leave it open, and hold himself free from all liability for the consequences, if the person injured by it happened at the time to be talking to a friend, and not looking straight before him. The principle that the accident must have happened from no fault of the plaintiff cannot in our opinion be carried so far.

We cannot find fault with the verdict on the evidence unless it be, as the defendant contends, that the plaintiff being drunk, the accident was on that account partly owing to his own fault; and so brings this within a class of cases in which it has been held that the plaintiff cannot recover—which we do not think.

Rule refused.

MUIR ET AL. V. CAMERON.

Promissory note—Consideration—Pleading.

Assumpsit against the maker of a note made payable to bearer, and averred to have been delivered by the defendant to the plaintiffs.

Plea—That the note was made for the accommodation of A. C. and J. C.; that there never was any consideration or value for the payment by defendant of any part of said note, and that the plaintiffs always held, and now hold, the same without any value or consideration.

Held, on demurrer, plea bad.

The defendant was sued as maker of a note made payable to the bearer, and averred in the declaration to have been delivered by the defendant to the plaintiffs.

The defendant pleaded that "he made the note for the accommodation of A. C. and J. C., and that there never was any consideration or value for the payment by the defendant of any part of the amount of the said note; and that the plaintiffs always held, and now hold the same without any value or consideration."

The plaintiffs demurred to this plea.

Hagarty, Q. C., for the demurrer, cited *Hooper v. Williams*, 2 Ex. 13; *Burns et al. v. Harper*, 6 U. C. R., 509; *Wallace v. Henderson*, 7 U. C. R., 88; *Hunter v. Wilson*, 4 Ex. 489.

Richards, contra, cited *Miller v. Ferrier*, 7 U. C. R. 540; *McGillivray v. Keefer*, 4 U. C. R. 456.

ROBINSON, C. J., delivered the judgment of the court.

It would be no defence, as against these plaintiffs, that the defendant made the note for the accommodation of other parties, for that is the common case of every man who becomes responsible for a friend to a third party, and gives his note for the debt.

For all that appears, the defendant may have given this note to the plaintiffs for the accommodation of A. C. and J. C., and at their request, for a debt which they then admitted to be due to the plaintiffs; and the defendant may, by this plea, be endeavoring to put the plaintiffs to proof of their debt, and may be disputing what the debtors themselves acknowledged.

The plea should have shewn how the plaintiffs got their note, if there is anything in the facts that should disable them from suing upon it. It is not enough to plead merely that they hold it without consideration, unless some fraud is shewn, or some particular fact as between the plaintiffs and the defendant, or the plaintiffs and the person from whom they took it, which should prevent them from recovering upon it. The mere allegation that they are not holders for value would be sufficient, if the note had been obtained by some other party through fraud, or upon some consideration which would make it illegal in the hands of such party, or without consideration; and if the defendant, after shewing that fact, were seeking to avail himself of the same defence against a third party by shewing that he was not a *bona fide* holder for value, and stands in no better situation than the payee.

It is true, that the declaration states that the defendant, having made the note, delivered it to the plaintiffs, and so, it has been argued, that it is apparent no one gave value for the note. But, though the plaintiffs have so stated their

case, we are not to assume that the note may not in fact have gone through the hands of other parties, by some of whom value was given for it. Those intermediate transfers are seldom stated, and need not be.

And besides, although a note given gratuitously cannot be enforced as between the donor and donee, it is only as between them that the defence applies (a). If the fact was that A. C. and J. C. made the plaintiffs a present of this note, by requesting the defendant to give his promise to these plaintiffs as a mere gift from them, and if that would be a defence, the plea should have disclosed the fact; but when the defendant tells us that he made the note for the accommodation of A. C. and J. C., he leaves us to infer that he did so upon a consideration admitted to be valid as between them and the plaintiffs, for the plea does not deny the allegation that the defendant delivered the note to the plaintiffs. And if so, then this defendant, without alleging any fraud or deceit, or illegality on the plaintiffs part, or in any one, attempts by this general form of pleading to put them to proof of a sufficient consideration as between them and A. C. and J. C., who for all that this plea discloses, are not objecting to the plaintiff's recovery.

It may, for all that appears, have been intended by A. C. and J. C. to lend the plaintiffs the sum in question, and they may have got this defendant to give his note in order to enable the plaintiffs to raise the money. In such a case A. C. and J. C. would have their remedy against the plaintiffs for repayment of the money thus lent, and the defendant would have his remedy against the parties accommodated. There can be no reason why effect should not be given to such a transaction, and yet it would be true in such case that the plaintiffs held the note without having given value for it.

Judgment for plaintiffs on demurrer.

(a) See Chitty on Bills, 76, 9th Ed. ; Heyden v. Thompson, 3 N. & M. 324.

(b) See Chitty on Pleading, 7 Ed. vol. iii. 151.

JAMES AND JACOB McQUEEN V. HUGH McQUEEN.

Account stated—Evidence—Consideration.

A. gave to B. and C. a writing, by which, for value received, he promised to pay them a certain sum in yearly proportions. This appeared to have been given for the price of land sold to A.

Held, that it was immaterial whether the land was owned by A. alone or by A. and B., and that the plaintiffs might recover either under a count as on an agreement, or on an account stated.

This was a second verdict, given upon a new trial granted on account of what was considered to be an erroneous ruling at the first trial, in regard to the proper construction and effect of a promissory note dated 29th December, 1845, whereby the defendant, for value received promised to pay to the plaintiffs, or their order, 102*l.* 15*s.* 0*d.* *to be paid in yearly proportions (a).*

This note was said to have been given for the price of land sold to the defendant.

The plaintiffs declared in two counts—as for a sum of money agreed to be paid in consideration of land bargained and sold, and on account stated.

At the trial, at Simcoe, before Sullivan, J., they relied wholly upon the last count (on account stated), and advanced the note as evidence of it. The general issue only was pleaded to that count.

The evidence was, that the consideration for the note was some land conveyed by deed of James McQueen to the defendant, at the same time that he gave the note. It seemed to have been some family arrangement. The land, as it appeared, was owned by James alone, and it was not shewn that any consideration moved from Jacob.

The learned judge held that the plaintiffs were entitled to recover upon the count on an account stated, taking the note as evidence of it; and that it was immaterial that for all that was shewn the consideration proceeded from James alone. The jury gave a verdict for the plaintiffs, for 136*l.* 14*s.* 0*d.*

McMichael moved for a new trial on the law and evidence, for misdirection, and for the rejection of evidence.

He referred to *Price v. Easton*, 1 N. & M., 303; 4 B. & Ad. 433, S. C. ; *Hagan v. Malone*, U. C. (H. T.)

Cur. adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

We see no objection to this verdict. It was quite immaterial as to the plaintiffs' right to recover on the note made by the defendant, whether the land which formed the consideration for it had been owned by James alone, or by him and Jacob McQueen.

The defendant in consideration of obtaining the land, undertook to pay the plaintiffs the amount of the note.

It is of no moment to him what may have been the arrangement between James and Jacob McQueen, in consequence of which the defendant gave his note to the two.

And we do not think there is any more difficulty in the way of the plaintiff's recovery upon the note under the common count, as evidence of an account stated. It is *prima facie* evidence of a debt between these original parties to the note, and that *prima facie* evidence is not repelled by anything that was proved; for, although the title may have come from James alone, he may have been trustee for Jacob as to part, or in the course of any transaction between the two he may have agreed to give Jacob a joint interest with himself in this debt, and if he did—the defendant agreeing to make himself debtor to the two as he did by the note, and the transaction concerning no one else—there is nothing against the note binding as evidence of a debt. It has been repeatedly determined that if a person by stating an account with another, admits a sum due by him, it is immaterial on what account the debt arose, so long as there was nothing illegal in the transaction.

Rule refused..

NEAL V. SCOTT.

Lease--Construction of, as to payment of rent.

A. leased certain premises to B., to hold, from the 15th September, 1846, for six years, at a yearly rent; the first payment to be made on the 1st of March, 1848, and the succeeding yearly payments to be made on the first day of March, *during the lease.*

Robinson, C. J., considered that the rent for the sixth year fell due at the expiration of the last year's occupation, viz., on the 1st of September, 1852.

Burns, J., was of opinion that the last year's rent should be accelerated, and therefore that two years' rent were due on the 1st of March, 1852.

Case for distraining the plaintiff's goods, no rent being in arrears.

Pleas.—1st. Not guilty "by statute." 2nd. 18l. rent in arrear.

At the trial, at Toronto, a verdict was taken for the plaintiff for 36l., subject to the opinion of the court on the following facts:

The plaintiff held the premises under a lease from the defendant, duly executed under the seals of both parties, of which the material parts are here given.

"This indenture, made on the twenty-fourth of February, 1847, between Thomas Scott and Daniel Neal, &c.; witnesseth, that in consideration of the yearly rents and covenants hereinafter mentioned, Thomas Scott hath demised, set, and to farm let unto said Daniel Neal all and singular, &c., to have and to hold the said, &c., unto the said Daniel Neal, his executors, &c., *from the first day of September, in the year of our Lord one thousand eight hundred and forty-six, for and during the term of six years thence next ensuing*, and fully to be complete and ended; yielding and paying for the same unto the said Thomas Scott, his executors, &c., the yearly rent or sum of eighteen pounds fifteen shillings good and lawful money of Canada, *the first of which to be made on the first day of March, which will be in the year of our Lord one thousand eight hundred and forty-eight, and the succeeding yearly rents to be paid on the first day of March during the lease.* And the said Daniel Neal, &c., covenants with the said Thomas Scott, &c., that he the said Daniel Neal shall well and truly pay, or cause to be paid, unto the said Thomas Scott, &c., the said yearly rent above

mentioned or reserved, according to the true intent and meaning of these presents, clear of and over and above all taxes and repairs whatsoever." Covenant by Daniel Neal to repair during the term, &c., &c., and at the end, or other sooner determination of the term, peaceably, &c., to yield up, &c., except the privilege of threshing and carrying away crop grown during the last year of the lease.

The plaintiff put in the following receipts for rent:

"£16 15s.

Oct. 1st, 1849.

Received from Daniel Neal the sum of sixteen pounds fifteen shillings currency on the rent of the year 1847.

(Signed)

THOMAS SCOTT."

£18 15s.

King, March 1st, 1852.

Received from Daniel Neal the sum of eighteen pounds fifteen shillings, being in full of one year's rent, *due on the first day of March, 1851.*

(Signed)

THOMAS SCOTT."

"£18 15s.

King, March 6th, 1851.

Received from Dr. J. Duncumb the sum of eighteen pounds fifteen shillings currency, being in full of one year's rent, *for the year ending first of September, 1851, for part of lot No. 10, 3rd Con. of King. This rent due 1st March, 1852.*

(Signed)

THOMAS SCOTT."

On the sixth of September, 1852, the defendant distrained for a year's rent, 18*l.* 15*s.*; for which this action is brought.

Boyd, for the plaintiff.

Hagarty, Q. C., contra, cited *Hopkins v. Helmore*, 8 A. & E. 463; *Platt on Leases*, vol. ii. 111, 118; *Woodf. Lan. and Ten.* 272, 3; *Gilb. on Rents*, 49.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we cannot hold in this case that at the time of the distress made there was no rent due; and if there was rent then due, this action must of necessity fail, even though the distress might be illegal on other grounds. The lease was to hold from the first of September, 1846, for six years, at 18*l.* 15*s.* yearly rent; the first payment to be made on the first of March, 1848, and the succeeding years' rent to be paid on the first day of March, during the lease. Taking this literally, the sixth year's rent would be payable on the first of March, 1853, which would be six months after the lease expires. It is not clear what the parties meant—

whether there were to be six years' rent paid; or whether only five, beginning from the 1st of March, 1847; or six years' rent, of which the first was to be paid on the 1st of March, 1848; the 2nd on the 1st of March, 1849; the third on the 1st of March, 1850; the 4th on the 1st of March, 1851; the 5th on the 1st of March, 1852;—which would be the last payment that could be made on the 1st of March within the term, but which, computing the years from the 1st of September, 1846, would only settle the rent up to the 1st of September, 1851, and would leave a year's rent due on the 1st of September, 1852. The receipt given on the 1st of March, 1852, seems to shew that Scott so understood it.

On the 6th of September, 1852, the defendant distrained as for a year's rent due on the 1st of September, 1852.

The action seems to be one under 2 Wm. & Mary, Sess. 1, ch. 5, sec. 5, which gives an action on the case to recover double the value of the goods distrained when no rent was due, and it is the owner of the goods only that by the statute can recover the double value. Can we say that on the 6th of September, 1852, when the defendant distrained, no rent was due? If not, this action must fail. I think the sixth years' rent from the first of September, 1846, was due, or rather, that the year had expired in respect of which the last year's rent was to be paid. To give the lease a construction that will make it consistent, we may hold, that on every 1st of March during the term, after the 1st of March, 1848, a year's rent should be paid in respect of the year's rent that had fallen due of the 1st of September preceding. Five such years' rent had been paid, which paid for five years' occupation up to the 1st of September, 1851. The rent due on the 1st of September, 1852, could not be paid on any 1st of March, during the term, unless it was to be paid in advance for the term ended on the 1st of September, 1852. This would leave a year's rent due from the 1st of September, 1851, without any specific direction when it shall be payable, and it would seem to follow that it must be payable when the year's occupation ends for which no rent has been paid. If so, then rent was due on the 6th of September, 1852, when this distress was made; and the allegation on which

this special action is wholly founded fails. It may perhaps be the more correct construction of this lease, that, as there were clearly to be six years' rent paid for the six years' occupation, which was to commence on the 1st of September, 1846; and as the last year's rent could not consistently with the lease, be paid on the 1st of March, 1853, because that would not be within the term, the payment of that year's rent should be accelerated; that it should be what is called a forehand rent in the case of *Hopkins v. Helmore* (8 A. & E. 463), which was cited in the argument, and which throws much light on the present question.

According to that construction, two years' rent would have been payable in March, 1852. I think the other construction more reasonable; that is, that the last year's rent fell due at the expiration of the last year's occupation, viz., on the 1st of September, 1852; and that no special provision being made for the payment on any other day, it was payable on that day. Taking it either way there was rent due at the time of the distress on the 6th of September 1851, and consequently this action fails.

BURNS, J.—This lease is obscurely worded, and it is difficult to see one's way satisfactorily to what the parties meant as to the time of payment of the last year's rent. I assume this, that both parties intended there should be six years' rent paid for the premises. The first year's rent was to be paid on the first of March, 1848, and the succeeding yearly rents on the 1st of March *during the lease*. The lease expired on the 1st of September, 1852, consequently the 1st of March, 1853, would not be during the lease. If the first year's rent were due on the 1st of March, 1848, and a single year's rent of 18*l.* 15*s.* were due on the 1st day of March in each year for 1849, 50, 51, and 52—excluding the first of March, 1853, because not during the lease—the landlord then would only be receiving five years' rent, and the effect would be, that the first six months of the term would be forgiven, and the last six months also. The expression in the lease, is, *the succeeding yearly rents during the lease*. The term beginning on the first of September, 1846, the first

year's rent was postponed for six months, viz., till the first of March, 1848, and the same result would be with the succeeding years, until the last year was arrived at. The covenant and reservation is not to pay after the expiration, but during the term. I see no other construction to give, in order to preserve what the parties have said, than to say that on the first of March, 1852, there was due two years' rent, instead of one. The effect of that is a postponement of the rent of the first year, and an acceleration of the last by a like period; namely, six months before the expiration of the term. This may have in truth been the real agreement between the parties. The landlord may have said to the tenant: "I have no objection to give you six months more time to pay your rent in for the first year; but, as the condition of my doing so, you must pay me the last year's rent six months before the expiration of the term." Whether such were the agreement or not, can only be matter of speculation, but it seems to me it is the only method of getting rid of the difficulty created by the use of the expression, "during the term," and limiting the payment to the 1st day of March, in each year. This is not inconsistent with the last receipt, for on the 1st of March, 1852, there was a year's rent due, and according to my construction, there was also the last year's rent due on the same day, in order to make the six years' rent during the lease. Judgment should be entered for the defendant.

DRAPER, J., concurred.

Judgment for defendant (a).

KIRBY V. HENRY FINKLE AND JOHN FINKLE.

Practice—Application for discharge from ca. sa., refused on account of delay.

The defendant was arrested on a *ca. sa.*—It appeared that the officer who made the arrest had no warrant from the sheriff, though he assured the plaintiff that he had authority to act. The defendant brought trespass against the plaintiff, and assessed damages. After such assessment after giving bail to the limits, and nearly two months after the arrest, he applied to be discharged, and to have the bail bond cancelled.—The court, under these circumstances, refused the application.

This was a rule *nisi* from the Practice Court, to shew

(a) See *Hutchins v. Scott*, 2 M. & W., 809.

cause why the defendant (Henry Finkle) should not be discharged from custody under a writ of *ca. sa.* in this cause, and the bail bond given by him for the limits be cancelled.

The defendant Henry Finkle made affidavit that on the 10th of September, 1852, he was arrested under color of this process by one Murray, a clerk in the Sheriff's office, who had, as the defendant believed, no warrant from the sheriff, and was not his deputy; that both the sheriff and Murray had since admitted to him that there was no authority to Murray to make the arrest. That Murray, as the defendant believed, acted under the direction and at the instance of the plaintiff: that the defendant was taken to gaol, and detained there six days, when he gave bail to the limits, and continues in custody on the limits under this *ca. sa.*

It was sworn on the part of the plaintiff, that the defendant Henry Finkle was arrested on the 10th of September, and gave bail to the limits on the same day, which was allowed some days afterwards; that the writ had been put into the hands of Murray, who, as clerk, managed the business of the sheriff's office, the sheriff being absent from his county; that he represented himself to be fully authorized to act for the sheriff in all things; and taking the writ with him went and made the arrest. That certificate of the allowance of the bail for the limits was taken out on the 15th of September: that on the 13th of September, Henry Finkle sued the plaintiff in trespass for causing Murray to make the arrest; and had proceeded to assess damages; and had recovered a verdict for 10*l.*

The defendant Henry Finkle first applied to set aside the arrest on the 2nd of November, after he had assessed damages in his action for the arrest; and nearly two months after the arrest.

It was sworn by the sheriff that Murray had no warrant for making the arrest.

Hagarty, Q. C., shewed cause, and cited *Norton v. Danvers*, 7 T. R. 375; *Taylor v. Phillips*, 3 East. 155; *Jones v. Price*, 1 East. 81; *Moore v. Stockwell*, 6 B. & C. 76.

Read, contra, cited Webb v. Taylor, 1 D & L. 684, 686; Wilson v. Hamer, 1 Dowl. 249; Esdaile v. Davis, 6 Dowl. 468; Hall v. Roche, 8 T. R. 187; Hall v. Hawkins, 4 M. & W. 590; Barry v. Eccles, 3 U. C. R. 112.

ROBINSON, C. J., delivered the judgment of the court.

The cases seem to be rather inconsistent as they regard the right of a party who has been arrested under such circumstances to be discharged, and to have the bail bond given up to be cancelled.

We think, considering the long delay that elapsed between the arrest and the application (seven or eight weeks), that we are not bound to make this rule absolute.

The plaintiff seems to have been assured by the sheriff's officer that he had authority to act for him in his absence, and we cannot say that there was anything wrong done intentionally by the plaintiff. The defendant has taken his remedy against the plaintiff, however by action of trespass; and for many weeks, while that was pending abstained from moving against the arrest. In the meantime the defendant was in the sheriff's keeping in the gaol, and this writ against him was in the sheriff's hands.

Considering that he has taken his remedy for being illegally brought there, and has delayed so long to move for discharge after he had given the bail bond to the limits, or rather had entered his sureties into a recognizance for that purpose, our opinion is, that we should discharge this rule, but without costs.

Rule discharged (a).

BEASLY V. BEASLY.

Former Recovery—Pleading.

When a former recovery is pleaded, and the action is of such a nature that it cannot be discovered from the record whether the same demand was in question, the plaintiff is not obliged to new assign, but may deny the identity of the cause of action.

ASSUMPSIT on the common counts. *Plea* — A former recovery for the damages the plaintiff had sustained

(a) See also *D'Argent v. Vivant, 1 East. 330; Pearson v. Yewens, 5 Bing. N. C. 492.*

as well on occasion of not performing the same identical promises, &c., as for his costs, &c. *Replication*—That the promises in this action were not the same as those in respect whereof the said judgment was recovered. *Demurrer* — Because, the plaintiff should have new assigned.

Connor, Q. C., for demurrer. *Burton*, contra.

In addition to the authorities cited in the judgment, *Palmer v. Temple*, 9 A. & E., 508; *Dawson v. Gregory*, 7 Q. B. 759; *Ross et al. v. Burton*, 4 U. C. R., 357; *Rogers v. Custance*, 1 Q. B., 77; *Moses v. Levy*, 4 Q. B., 213; *Hitchins v. Campbell*, 2 W. Bl., 779; 1 Saund. 926, note *f*, were referred to.

ROBINSON, C. J.—I am of opinion that this replication is good, and that the language of the court in the case cited, of *King v. Hoare* (13 M. & W., 503), must be taken with some modification. It is there said: "In the case of a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue, on the plea. If the judgment be recovered for another cause, there must be a new assignment." When the declaration is on a bond of special agreement of any kind, so that the identity of the cause of action is apparent on the record, it would seem that matter of record only is put in issue by the plea; but in cases where it is impossible to discover from the record whether the same demand was in question in both actions, such a replication as the present seems to have been always held proper. A person may have sold goods at several times to the same party—one parcel at three months' credit, and another at six,—and having sued for the former when the credit for the latter had not yet expired, and recovered for them, when he brings his action for the price of the other goods, the record of the first recovery being upon a declaration which would *prima facie* admit of a recovery for all the goods sold and delivered up to that time, the matter must be allowed to be set in its true light by the averment that the first recovery was not in fact for the same cause of action. The plea that the first recovery

was not for the same debt, is, in effect, a new assignment, and that any formal new assignment, is necessary in such a case seems to be a position at variance with authority.

The case of *Sedden v. Tutop*, (6 T. R., 607) is precisely like the present, and the pleadings the same. I refer also to *Stafford v. Clark*, (2 Bing. 377) to *Heyden v. Thompson* (1 A. & E. 217) and to *Lord Bagot v. Williams*, (3 B. & C. 235.)

Mr. Chitty gives the form of such a replication, without stating any doubt as to its admissibility (a). The weight of authority is certainly in favor of the plea, unless it could be shewn that the cases I have referred to have been advisedly over-ruled; and it should be our inclination, I think, not to multiply unnecessarily the occasions for new assignments.

BURNS, J.—The question in this case is, whether it comes within the rule established by *Wheeler v. Senior* (7 M. & W. 562), which was decided upon the authority of *Heyden v. Thompson* (1 A. & E., 210), and what is said in *King v. Hoare* (13 M. & W. 503). If it does, and it is necessary for the plaintiff to new assign, then the observation made by Lord Abinger in *Wheeler v. Senior*, viz.: "If there were a new assignment, the defendant might plead again the same plea as is here pleaded, and so on *ad infinitum*," might take place, and I cannot see where it would end. The Court of Exchequer says that it would have been better satisfied if the authority had permitted the replication to be sufficient, but it was fettered by the decisions. The case before us is, however distinguishable from *Heyden v. Thompson*, and *Wheeler v. Senior*; and does not come within that class, but comes within another class of cases which have been uniform in the decisions. In the two cases mentioned, the action was for recovery in each of a specific debt, viz., upon bills of exchange, and the defendants respectively, by their pleas, set up that the bills were bills themselves which they respectively set forth, and that the same had been paid. It was held that the

(a) Chy. on Pl., vol., iii., 7th Ed., 436.

plaintiffs in these cases should have new assigned, and could not reply that the bills which the plaintiffs declared upon were other and different bills from those mentioned in the pleas, and so conclude to the country. The argument is based upon the proposition that the *quæ est eadem*, or what is equivalent to it, is not traversable matter, that the plaintiffs must new assign, and give the defendant an opportunity of answering. The case of Heyden v. Thompson was decided by Mr. Justice Patteson, by consent of the parties, in the bail court, and upon his decision the plaintiff amended and new assigned; and to the new assignment the defended pleaded precisely the same plea. The plaintiff then replied as he had to the first plea, that the bill mentioned in the plea to the new assignment was not the same as the bill sought to be recovered. The court held this replication bad; and then the plaintiff amended again, and tended an issue on a particular fact alleged in the plea, admitting the bill mentioned in the plea. The defendant again demurred but the court held the replication good, and Mr. Justice Patteson says: "I am inclined to think that the present replication would have been a good answer to the original plea, but it is unnecessary to decide that." Admitting that these cases do establish that in cases where the declaration demands a specific debt upon a security, and the plea limits the demand, to something which the defendant asserts to be true, it is necessary for the plaintiff to new assign—yet, were the plaintiff's demand is general, and the plea is as general as the demand, then, in such a case, it is permitted to the plaintiff to deny the allegation in the defendant's plea, that the causes of action are the same as contained in that matter which the defendant asserts destroys the plaintiff's demand. The plea in this case must assert, in addition to the judgment recovered, that the judgment was recovered for the same cause of action contained in the declaration, and therefore the allegation is a material one. The replication here admits the judgment but traverses the other material allegation, and so far it then resembles the point ultimately determined in Heyden

v. Thompson. The strongest argument in the defendant's favor is, that it might operate as a hardship upon him in case the plaintiff had two demands, one of which might be paid, and the other might have previously been reduced to judgment, if the plaintiff upon a plea of judgment recovered, could reply as in this case; for then the defendant would be deprived of his defences of payment. This is answered by the fact, that before the defendant is called upon to plead he is entitled to the particulars of the plaintiff's demand: and if he pleads a judgment recovered to the whole demand, when he could establish a part of it paid, it is his own fault. If one part of the demand which the particulars disclose has been reduced to judgment, and another part paid, or if there be any other defence to it, the defendant should shape his defence accordingly. If the plea had enumerated any demands the plaintiff had, and then pleaded as to them that a judgment had been recovered, and that they were the same demands which the plaintiff was again suing for, then I have no doubt a new assignment would be required, because such a plea would limit the extent of the declaration; and the allegation that the causes of action mentioned in the plea are the same as in the declaration, must receive the limited construction. In the present case, the plea being as general as the declaration, the defendant undertakes that whatever cause of action the plaintiff has, they are all included in the judgment. The plaintiff in reply says: "I admit your judgment, but the causes of action I am now suing for are not included in it." As I before remarked, if this causes hardship to the defendant, it is his fault; for when he has the plaintiff's particulars of demand before being called upon to plead, he should be particular in his pleas, and not leave the matter in any uncertainty. By the particulars of the demand he knows what he is called upon to defend himself against.

This view, I think, is fully borne out by the cases of *Sedden v. Tutop*, *Lord Bagot v. Williams*, and *Moses v. Levy*, which have been already referred to; and by *James v. Lingham* (5 Bing. N. C., 557), *Freeman v. Crafts* (4 M. &

W., 4), *Ferguson v. Mahon* (9 A. & E., 245), *Alston v. Mills* (*Ib.*, 248), *Dite v. Hawker* (7 Jur. 768), *Jubb v. Ellis* (9 Jur., 1057), *Calvert v. Gordon* (7 B. & C. 809).

DRAPER, J., concurred.

Judgment for plaintiff on demurrer.

CHRISTOPHER YOUNG AND ABEL YOUNG v. SCOBIE.

Receipts for purchase money of land—Omission of purchaser's name, effect of—Land sales acts,—4 & 5 Vic. ch. 100, 12 Vic. ch. 81—misjoinder of plaintiffs in ejectment—14 & 15 Vic. ch. 114.

The plaintiff produced two receipts of certificates of deposits to the credit of the Receiver General, on a purchase of certain lands. In both receipts the money was expressed to have been received from the plaintiff: in the first a blank was left for the name of the person to whom the sale was made, the words "sold to" being inserted: in the second no mention was made of the purchaser. *Held*, that the receipts imported a sale to the plaintiff, in the absence of any proof to the contrary.

The agent for disposing of the Indian Lands on the Grand River does not come under the designation of a district agent of the Commissioner of Crown Lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the land sales' acts.

Quære as to the effect of a misjoinder of plaintiffs in ejectment under the new act, 14 & 15 Vic. ch. 114.

EJECTMENT for lot 2, east side of Argyle street in Caledonia.

The defendant limited his defence to that part of the rear of lot No. 2, which is situated immediately in the rear of the residence of the defendant, and which is now occupied by him as a garden.

On the part of the plaintiffs, at the trial at Cayuga, before Sullivan, J., a receipt was produced, dated the 18th of June, 1830, signed by David Thornburn, Esq., the Commissioner, for the sale of the lands of the Six Nation Indians on the Grand River, in these words: "Received from Christopher Young a certificate of deposit to the credit of the Receiver General, with the Gore Bank, of this day's date, for £25, being the first instalment, one third of the purchase money on Lot 2, east side of Argyle street, in the town of Caledonia, in the county of Haldimand, sold to———, at the rate of £75, the balance payable in six equal annual instalments, with interest to be reckoned from the date of this receipt."

"It is an express condition of the above sale, that the purchaser, or his heirs and assigns, shall regularly pay the instalments, together with interest, as they become due, till the whole shall have been paid and satisfied, under pain of forfeiture of the lot above sold, and also all of the instalments paid on account of the same."

They produced also a second receipt as follows: "Received, 24th June, 1852, from Christopher Young, a certificate of deposit to the credit of the Receiver General of the sum of £18 13s. 9d., as the 2nd and 3rd instalments on new sale, No. 1263, being for lot No. 2, on the east side of Argyle Street, in the town of Caledonia, in the county of Haldimand."

These receipts were relied upon as sufficient to entitle the plaintiffs to recover under the Land Sales Act.

It was objected that the receipts were only for payments from Christopher Young, and that this being a joint action by him and Abel Young, neither could recover separately. 2ndly. That it did not appear from the receipts to whom the sale was made.

The learned judge directed a verdict for the plaintiff, Christopher Young, reserving leave to move for a nonsuit to be entered for the defendants on these objections.

Martin obtained a rule *nisi* for a nonsuit, or new trial without costs, for misdirection and for the reception of improper evidence. He cited *Doe dem. Anderson et al. v. Errington*, 1 U. C. R., 159; *Doe dem. Barwick et al. v. Clement*, 7 U. C. R., 549; 14 & 15 Vie. ch. 114.

Freeman shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Supposing, which it is not necessary to determine, that Mr. Thorburn stands in the place of one whose certificates comes within the Lands Sales Acts, we think the receipts import a sale to Christopher Young, who paid the money, and to him only, in the absence of any proof that the fact was otherwise; that no title was shewn in the other plaintiff; and therefore that, ejectment being no longer a fictitious action, ostensibly maintained by John Doe on a demise from others, but an actual claim of right in the

plaintiffs who are suing, we must hold that there was a misjoinder of the plaintiffs, which, as in other actions, must be fatal in ejectment; and indeed if this action had been in the old form, the late case of *Doe dem. Wilton et ux. v. Beck* (20 L. Times, 67, 13th Nov. 1852), shews that the objection would have been fatal, and that it could not have been cured by any amendment that could be properly made at *Nisi Prius*.

Rule absolute (a)

DAME V. CARBERRY

Customs act, 10 & 11 Vic. ch. 31—Construction of—Notice of Claim—Value of vessel—Trespass.

On the 7th of June, the defendant, a collector of customs, seized the plaintiff's vessel for a breach of the revenue law. The plaintiff sent a petition to the government, and on the 7th of July received an answer from the defendant, informing him that they had refused to interfere. On the 8th of July the plaintiff served a notice of claim.

Held, first that the notice of claim, required by sec. 48 of 10 & 11, Vic. ch. 31, to be given within one calendar month from the day of seizure, could not be waived by any representation of the defendant to the plaintiff.

Secondly, that no notice having been given within the time allowed, the vessel was *thereby* condemned; and that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass.

Thirdly, that in this case it was not necessary that the value of the vessel should be determined by the jury.

This was an action of trespass, tried at the last assizes held at Kingston before his Lordship the Chief Justice. The plaintiff complained that the defendant seized and took a vessel of his called the "Canadian," on the 15th of July, 1852, and unlawfully kept and detained her, and converted and disposed of her to his own use.

(a) NOTE.—The court intimated, at the time of giving judgment, that the agent for disposing of the Indian Lands on the Grand River did not, in their opinion, come under the designation of a district agent of the Commissioner of Crown Lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sales Acts, 4 & 5 Vic. ch. 100, and 12 Vic. ch. 81; and in that view of the case, this action could not be sustained independently of the objection of misjoinder of the plaintiffs. As regards that objection, the new ejectment Act was not adverted to by the court in giving judgment, though relied on in the argument. See 14 & 15 Vic. ch. 114, preamble, and secs. 7, 8, 9, 10, 12, 13, 14, which seem to bear on this question of a misjoinder or the plaintiffs being fatal; and the question of the effect of the 7th clause on the point of misjoinder of plaintiffs, when compared with the preamble and the other parts of the statute, may be considered as still open to discussion.

It appeared that the defendant, being the collector of customs at the port of Napanee on the 7th of June last, seized the "Canadian," for having committed a breach of the revenue laws. On the 14th of June the plaintiff forwarded a petition to the Inspector General, stating that information of the vessel having landed a barrel of molasses, with some salt and cigars, without their having been entered at the customs house, had been given by a discharged sailor: and stating that there was no intention to defraud the revenue; and he prayed that the Inspector General would put a favorable construction upon the matter, after reading the affidavit which accompanied the petition. On the 3rd of July the Inspector General's department communicated both to the plaintiff and defendant that after an inquiry into the circumstances the department deemed it unadvisable to interfere to recommend a release of the vessel. On the 6th of July the defendant communicated the same fact by letter to the plaintiff, which letter the plaintiff swore he received on the 7th of July. The plaintiff then made out a notice of claim; and that he would contest the validity of the seizure. This notice was dated the 7th, but was not served until the 8th of July. On the 7th of July the vessel was advertised to be sold on the 15th of July, at auction, and she was sold on that day for 205*l*. The plaintiff gave notice of action on the 24th of July, and afterwards brought the present action.

It appeared that after the seizure the plaintiff called upon the defendant, and stated that he was willing to bond the vessel; but the defendant represented to him that he need not do so, and need not give notice of claim until he heard the result of the application to the government: and the plaintiff contended that having acted upon that representation, he might put in a claim after the expiration of the month; and that the defendant having caused the vessel to be sold after being served with the notice of claim without any further proceedings taken against her, became liable as a trespasser.

Upon these facts the learned Chief Justice nonsuited the plaintiff, and the plaintiff's council accepted the nonsuit without prejudice to move against it.

Kirkpatrick, Q. C., obtained a rule *nisi* to set aside the non-suit, on the ground of misdirection. He contended that the value of the vessel was a material matter to be determined; and that it should have been left to the jury to say what her value was; for according to that value it was to be ascertained whether the vessel itself be forfeited, or whether it be the penalty of 200*l.* according to sec. 9 of ch. 31, 10 & 11 Vic. In either case, he also contended, that there should be some information or proceeding *in rem* against the vessel, in order to condemnation, and that a sale without such condemnation was illegal. He cited, to shew that the notice might be waived, *Taylor v. Clemson*, 11 Cl. & Fin. 610.

McKenzie shewed cause.

BURNS, J., delivered the judgment of the court.

We think the rule must be discharged. The effect of the 9th sec. of 10 & 11 Vic., ch. 31, is, that if the vessel be under the value of 200*l.* it is forfeited for an infraction of the law; and if the vessel be above that value then that the master or person in charge shall incur a penalty of 200*l.* and the vessel may be seized and detained, for the space of thirty days, and if the penalty be not paid during those thirty days then the vessel may be sold to pay it. The 48th section of the act applies to all cases, no matter what the value of the vessel may be; and if no claim be put in during the space of one calendar month, then at the expiration of that time the vessel would *ipso facto*—that is, by the circumstances of no claim being put in—stand condemned. The effect of these two sections we take to be this: that if the vessel be under the value of 200*l.*, and the owner or proprietor admits that she has infringed the law, the vessel is forfeited; but if he contest her having infringed the law, then, by making claim, &c., he can contest that fact. If the value of the vessel be over 200*l.*, and the owner admits that she has infringed the law, he may get his vessel back by the payment of 200*l.* within the thirty days; or, if he contests that she has infringed the law, he can obtain her by putting in claim within the month. In this case the plaintiff neither paid the penalty within the thirty days, nor

did he put in a claim within the calendar month. He did not pay the penalty, because he seems to contest that his vessel had in any way violated the law. He did not put in a claim, because he thought upon what the defendant gave him to understand, that he might do so when he heard the result of his application to the executive government, which he had made to have his vessel released. The plaintiff's right, therefore turns upon this latter point; and he contends that he might put in a claim after the expiration of the calendar month, because the information he received from the defendant led him to believe so. If it be true that he did receive such information, and relied upon it, and was induced to act accordingly, and therefore sustained an injury, still these are not matters which we can consider as giving to the plaintiff a right to maintain an action of trespass against the defendant. By the act of seizure of the vessel as for an infraction of the customs laws, the crown had acquired an interest, and it was not competent for the custom-house officer to waive anything required to be done by the plaintiff under the act of parliament, which could affect or diminish such interest. It was the duty of the plaintiff to comply with the terms of the act in order to place himself in a position to contest whether the law had been broken by those in charge of his vessel.

The plaintiff further contends that he has not lost his right of property in the vessel until condemnation by some proceeding by way of information. That is not so; for the proper construction of the act is, that if no claim be made within the calendar month the vessel would be thereby condemned without further proceedings; and, if seized for the penalty of 200*l.* would be, for non-payment thereof within thirty days, liable to be sold. According to *Williams v. Despard* (5 T. R. 112), the plaintiff's right of property, to enable him to maintain trespass, was determined by the seizure.

The plaintiff contends that the value of the vessel was a point which should have been submitted to the jury. The value is a matter of no consequence, except in a case where the owner contests the question whether the vessel

has or not infringed the law, and where he has complied with the statute by putting in claim, and having received the property back upon bond. If she has infringed the law, the owner may lose the vessel or pay the penalty of 200*l.* at his option. If the owner enters into security to contest the validity of the seizure; then, if there be a condemnation, the owner is entitled to have his security cancelled upon paying the value of the article condemned. In this case the value becomes material to be inquired of, but in no other case.

We think it clear that the plaintiff has not established any right to maintain an action of trespass; and that the nonsuit was right.

Rule discharged.

TYSON V. JARVIS.

Action for false return—Pleading.

Action against the sheriff for a false return of *nulla bona* to a *fi. fa.* against M.—The defendant pleaded that he as sheriff did take in execution goods and chattels of the said M., under and by virtue of the said writ; and did levy thereout the moneys indorsed thereon, as he was commanded.

Held, on demurrer, plea bad, as admitting the plaintiff's cause of action.

The plaintiff sued the sheriff for a false return of *fi. fa.* against one McLeod and others, at the plaintiff's suit; averring that the defendants had goods sufficient to satisfy the writ, out of which the sheriff could and ought to have made the moneys, &c., of which he had notice: yet that, wrongfully disregarding his duty, he did not seize the goods, or any part thereof, or levy the money, or any part thereof, but neglected so to do, contrary to his duty; and afterwards falsely and deceitfully returned that the defendants had not any goods or chattels in his county whereof he could levy the moneys, or any part thereof, as by the said writ and the return thereof remaining of record will fully appear.

The defendant pleaded that he, as such sheriff, &c., did seize and take in execution the goods and chattels of the said McLeod, and the other defendants, under and by

virtue of the said writ in the declaration mentioned and did levy thereout the moneys indorsed thereon, as he was commanded—concluding to the country.

The plaintiff demurred to this plea, on the ground that it amounts to the general issue, and is an attempt by the sheriff to falsify his own return.

Eccles for the demurrer.

Hagarty, Q. C., contra, cited *Mullett v. Challis*, 15 Jur. 243; *Wylie v. Birch*, 7 Jur. 626; 4 Q. B. 566, S. C.; *Long v. Lee*, 4 U. C. R. 377.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the plea is bad, for it admits the false return complained of, and strengthens the plaintiff's action. It admits not only that the defendant might have made the money, but that he actually did make it, and that he nevertheless falsely returned that the defendants in the *fi. fa.* had no goods.

The case on which the defendant relies, of *Wylie v. Birch*, has no application to this case—the plea there was held to shew sufficiently that under the circumstances of the case the plaintiff had sustained no damage by the alleged misconduct of the sheriff; for that, if the goods had been sold, the sale would have been wrongful, and the proceeds could not legally have gone to the plaintiff. This plea shews nothing of the kind; for all that appears in it, the sheriff, after selling the debtor's goods under this writ, may have wilfully misapplied the money, and then falsely and deceitfully returned that the debtor had no goods. If the facts were such that, notwithstanding the sheriff had sold the debtor's goods, as he alleges in his plea, he could not give the plaintiff the benefit of the proceeds, and so that it was substantially true that the defendant had no goods out of which the plaintiff's debt could legally be satisfied, and that the plaintiff had therefore suffered no injury by the false return—the plea should have set out those facts. If the defendant has a defence, he has not stated it.

Judgment for the plaintiff on demurrer.

LEY V. LOUDEN AND DEMPSEY.

Arrest—For what sum—Plea justifying under void ca. sa.—Replication to.

The provision in 5 Wm. IV., ch. 3, that no *ca. sa.* shall issue on a judgment where the sum recovered is under 10*l.* exclusive of costs, is still in force.

When a pleading concludes with verification by record, it is not requisite to give a day for inspection, this being unnecessary until the record is denied.

In an action of trespass the defendants justified under a *ca. sa.*, and the plaintiffs replied that the judgment on which the writ issued was for a sum less than 10*l.* exclusive of costs, "wherefore the said writ of *ca. sa.* was and is void,"

Held on demurrer, that it was unnecessary to aver that the writ was set aside for the replication shewed it to have been not merely irregular, but illegal and void.

In this case the defendant Louden, by the other defendant Mr. Dempsey, as his attorney, sued out a writ of *ca. sa.* against this plaintiff Ley, upon a judgment of a county court in an action of *assumpsit*.

Ley being arrested upon that writ sued them in trespass in this action, and they pleaded severally, justifying under the *ca. sa.* and setting out the judgment as having been rendered for 21*l.* 7*s.* 9*d.*, awarded to Louden for his damages for the non-performance of the defendant's promises, and also for his damages and costs, &c.

The plaintiff replied to each of these pleas, that the judgment was obtained in the county court, after the 29th of March, 1845, viz., on the day in the plea mentioned (7th December, 1849,) for 8*l.* 1*s.* 11*d.* for damages sustained by non-performance of the promises, and 13*l.* 5*s.* 10*d.* costs, and so that the "said judgment was rendered for a sum less than ten pounds exclusive of costs; wherefore the said writ of *ca. sa.* was and is void"—concluding with a verification by the record.

The defendants severally demurred to these replications, taking a variety of exceptions, of which those that are material to be noticed appear in the judgment.

Dalton, for the plaintiff, relied on the provisions in the statute 5 Wm. IV., ch. 3, sec. 2, which enacts that it shall not be lawful to take execution against the body of any person in any case in which the judgment shall not be rendered for the sum of ten pounds or upwards, exclusive of costs.

Dempsey, contra, contended that this provision in 5 Wm. IV., ch. 3, is no longer in force, since the passing of the act 7 Vic., ch. 31: that the *ca. sa.* not having been set aside must be a valid justification: that for all that appears, the debt with interest might have amounted to 10*l.* without the costs; that the conclusion of the replication is improper, because, if proper to verify by the record, a day should have been given for inspection.—He cited *Baker v. McKay*, 1 Chamber, Rep. 73; *Prentice v. Harrison*, 4 Q. B. 852; *Rankin v. De-Medina*, 1 C. B. 183; *Jones v. Williams*, 8 M. & W. 395; *Brown v. Jones*, 15 M. & W. 191; 2 Saund. 48.

ROBINSON, C. J., delivered the judgment of the court.

As to the conclusion of the replication, it is quite regular. There must be a verification, either by the record or of fact (*Snow v. Stephen*, 2 Dowl. P. C. 664), and here it could only be by the record. No prayer of judgment is any longer necessary since the new rules, and the giving day to inspect the record is not necessary till the existence of it has been denied.

As to the other grounds: We are of opinion that the provision which forms part of 5 Wm. IV., ch. 3, that no *ca. sa.* shall issue on a judgment in a case where the sum recovered is under 10*l.* exclusive of costs, is still in force. It was not repealed by the statute referred to in the argument, (7 Vic. ch. 31), but was merely superseded by the inconsistent enactment contained in that statute, which, while it was in force, was in this respect a virtual repeal of the former. But the statute 7 Vic. ch. 31, is itself repealed by 8 Vic. ch. 48, sec. 1 and 5 Wm. IV. ch. 3, has always since that repeal been taken to be in force, having been merely superseded, or kept down as it were, by the effect of the 7th Vic. ch. 31, which obstacle to its operation is now removed. This is well understood to be the effect of the repeal of 7 Vic., and the 5 Wm. IV. ch. 3, is in consequence daily acted upon as being in force; and the legislature, by their subsequent acts, have assumed it to be in force (*a*).

As the supposed defect in the replication not shewing that the *ca. sa.* was set aside: That plaintiff's right of action

cannot depend upon that. It is not an irregularity merely that is alleged, but the writ is shewn to have been illegal, because not supported by a judgment that would warrant it, which it must be in order to make it a good defence for the party suing it out, or for his attorney; though the sheriff, perhaps might stand on other ground, as he is supposed to know nothing of the judgment. The replication shews the plaintiff to have been arrested in a case which a statute positively enacts that it shall not be lawful to arrest him; it is therefore a void and illegal process, unsupported by a judgment—and if a judge on application should refuse to set it aside, yet the party could not protect himself under it.

The plaintiff is in our opinion entitled to judgment on the demurrers.

Judgment for plaintiff on demurrer.

BEATY V. FOWLER.

12 Vic. ch. 74—13 & 14 Vic. ch. 62—Chattel mortgages—Re-filing of.

Where a mortgage of personal property was re-filed with the county clerk forty-seven days before the expiration of a year from the first filing, it was held insufficient, the statute requiring that such re-filing shall take place “*within thirty days next preceding*” the expiration of one year.

It is not necessary that the affidavit of execution should be repeated, or any copy of it filed, on the re-filing of such mortgage.

This was an interpleader suit, in which a verdict was taken for the plaintiff subject to the opinion of the court on the following facts:—

In November, 1850, a judgment was entered in favour of Fowler, the now defendant, against one Jackson, in an action brought for goods sold and delivered to Jackson, and a *fi. fa.* was issued, to which the sheriff returned *nulla bona*.

On the 20th of February, 1850, Jackson made a mortgage to Beaty (the plaintiff in this case) of one horse, two cows, and all the household furniture then being in and upon his (Jackson's) house and premises, in the township of Bentineck, to secure a debt of 70*l.* for money advanced by Beaty to Jackson, which money was to be repaid in a year, with interest. It was stipulated in the instrument that Jackson might remain in possession till default made.

On the 26th of January, 1852, an *alias fi. fa.* was issued, and under it the sheriff, on the 29th of January, seized

goods on Jackson's premises, which at that time were in his use and occupation, and this plaintiff claimed these goods under the assignment made by Jackson, by way of mortgage, on the 20th of February, 1850. There was no attempt made to impeach the mortgage, as in any respect fraudulent or colorable. The mortgage was executed on the 20th of February, 1850, on which day a proper affidavit of execution was sworn by the subscribing witness, and the mortgage was filed with the county clerk on the 25th of February, 1850. On the 9th of January, 1851, a copy of the mortgage was filed in the same office, with a copy of the affidavit of execution made on the first filing, and with an affidavit made by Beaty, the mortgagee, on the 7th of January, 1851, according to the statute 13 & 14 Vic. ch. 62, that the debt was yet justly due, and that the mortgage was made in good faith. On the 8th of January, 1852, another copy of the mortgage was filed with the county clerk, with an original affidavit of Beaty as to the mortgage having been executed *bona fide*, and the debt being still due.

The defendant took these objections to the plaintiff's title,—

1st. That the second registration was not within thirty days next preceding the expiration of one year from the first filing; that year expired on the 24th of February, 1851, or certainly on the 25th, and the said filing being on the 9th January, 1851, was not within thirty days of that day, but was forty-seven days before it.

2nd. That there should have been a second affidavit of the execution of the mortgage, and not a copy merely of the affidavit that had been first filed.

3rd. That on the occasion of the third filing on the 8th of January, 1852, there was neither an original affidavit of execution, nor a copy of such affidavit.

Wilson, Q. C., for defendant. *Jones*, contra.

ROBINSON, C. J., delivered the judgment of the court.

No attempt was made to shew the existence of fraud, or any colourable transaction, and under these circumstances, we cannot hold the assignment to Beaty void, on account of anything on the face of the assignment itself, or because

Jackson was allowed to continue in possession after default made. If the *fi. fa.* can be held by us to be entitled upon legal grounds to be preferred to the mortgage, it must be by reason of the other objections raised by the plaintiff's counsel on account of failure to comply with the provisions of our statutes 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62, respecting the registry of such assignments.

As to the alleged want of a second affidavit of execution on the second filing, we see nothing in the statute that requires that affidavit to be repeated, or any copy of such affidavit to be filed upon the re-filing of any such mortgage. There was on each occasion of re-filing an original affidavit made by the mortgagee of the debt being due, sufficiently complying in that respect, we think with the statute.

We see no ground of objection that can be maintained, unless it be that the second filing was not within thirty days next preceding the expiration of a year from the first filing. In that respect, certainly, the statute 12 Vic. ch. 74, sec. 3, has not been complied with. The plaintiff seems to have acted as if he was resolved to be in time, and as if he supposed that all the legislature could have meant was that the mortgage should be re-filed within the year, or thirty days *after it*; but whatever they meant, the act is as plain as words can make it, that the second filing must be *within thirty days next preceding the expiration of one year from the first filing*. Certainly, if filing the second time *forty-seven days before the year had expired*, could be held to be a compliance with this condition, then a re-registry at the end of ten days from the first filing, would be a compliance, for that would not be more clearly out of the thirty days next preceding the end of the year than this is. The legislature probably did mean to require that the second filing, and the statement of the debt being still due, should be made near the end of the year, and not sooner; but whatever they may have meant, the language is quite free from ambiguity, and we must give effect to it. Now, if, in this respect the re-filing has not been made as the statute directs—and we think clearly it has not been—the consequence is, that the mortgage ceased to be valid as

against creditors, after the expiration of the year from the first filing ; that is, in this case, after the 24th of February, 1851. This defendant's judgment was in force from November, 1850, and is still unsatisfied, so that the mortgage ceased to be valid as against him.

A verdict must, in our opinion, be entered for the defendant.

Judgment for the defendant.

LOTT V. FRENCH.

Trover—Special damages.

TROVER—The plaintiff offered evidence to prove that in consequence of being deprived of the tools for which this action was brought, he had been prevented from undertaking work as a master-carpenter. This was laid in the declaration as special damage. Held that such evidence was rightly rejected.

TROVER for some carpenter's tools alleged to be of the value of 10*l.* : tried at Cobourg, before Draper, J.—Verdict for the plaintiff, 7*l.* 10*s.*

Eccles obtained a rule *nisi* for a new trial. He cited *Bodley v. Reynolds*, 8 Q. B., 779.

Walbridge shewed cause, and cited *Moon v. Raphael*, 2 Bing., N. C. 310 ; 2 Scott, 489 S. C. ; *Davis v. Oswell*, 7 C. & P., 804.

The facts of the case are stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff avers, by way of laying special damages that he is a master carpenter and joiner ; that by reason of the defendant's wrongful conversion of these tools he had been thrown out of employment, and deprived of the means of working at his trade, and had been obliged, in order to gain a living, to work as a journeyman, and that he had lost the profits which he would otherwise have made in the course of his trade, amounting to 20*l.*, and he lays his damages at 30*l.*

The tools were sworn by a witness to be worth about 4*l.* 10*s.*, though the plaintiff himself valued them at 10*l.*, and there was room for doubt on the evidence whether the defendant was justly chargeable for converting them, at

least chargeable to the amount of their value, for it appeared that the plaintiff had hired the tools, or part of them, to another person, who came at first with a verbal message to the defendant, in whose house they had been left by the plaintiff, to deliver them to him, but the defendant declined to give them up. This messenger, Frost, afterwards brought a written order from the plaintiff for the tools, but the defendant alleged that as it was in his own writing, and as he doubted the genuineness of it, he declined to let him take the tools. Frost, in consequence, brought an action against the defendant in the Division Court, and recovered against him for his loss of time occasioned by the disappointment, and brought another action against him for the tools, which is still pending, and now the plaintiff, as owner of the tools, brings an action in this court, and has recovered a verdict for 7*l.* 10*s.* which is one-half more than the tools were sworn to be worth.

The plaintiff however was not satisfied at the trial with endeavoring to recover the value of the tools, but he offered evidence to prove that in consequence of being deprived of them he was prevented from undertaking work as a master carpenter.

The learned judge rejected this evidence of special damage, and on this account a new trial is moved.

The plaintiff's counsel relies on the case of *Bodley v. Reynolds*, which very much resembles the present. If it went the necessary length for sustaining the ground on which this rule is moved, I should, for my own part, leave that case to stand upon its merits till it comes to be particularly examined, and compared with previous decisions by the same court, or by other courts in England. A stronger reason could hardly be imagined for questioning its soundness than that it has the appearance of giving support to the present application. When we consider the facts of this case, we cannot but feel that unless the law must be upheld as a system of oppression, there can be no pretence for finding fault with this verdict on the ground of smallness of damages. In the case referred to, of *Bodley*

v. Reynolds, all that the court determined, and that not without difficulty and consultation with the other judges, was, that it was not a misdirection to tell the jury that they might if they thought fit, give damages for detaining the tools.

The learned judge, in the present case, did not tell the jury that they must necessarily give the exact value of the tools, as if the defendant had got them by purchase; and in fact the jury seem not to have considered that they were so limited, for they gave 7*l.* 10*s.* for detaining tools worth 4*l.* 10*s.* The learned judge was right, in my opinion, in discountenancing any attempt so absurd, as to build up a claim for special damage on the ground that because the defendant detained for a time some tools of trifling value, which the plaintiff himself had in fact lent or hired to another man, the plaintiff was thereby disabled from undertaking work as a master-carpenter. Any reasonable compensation for trouble and delay in purchasing other tools might be allowed, and in case of a flagrant wrong done without excuse of any kind, something in the way of damages being added by the jury would hardly be objected to as fatal to the verdict; but to hold that if a carpenter has a saw or a chisel detained from him he may abstain from labor for weeks or months, and claim damages at the end of that time for the loss of the profits he might have made by building a house, would be so absurd in itself, and so inconsistent with the law as it has been long laid down by eminent judges that we will abide by what is consistent with reason till an act of parliament has changed the law, or till a superior jurisdiction shall determine that in trover the value of the chattel, with any reasonable damages for the detention, is not, even in ordinary cases, the fit measure of compensation.

Rule discharged.

SUTHERLAND ET AL. V. BETHUNE.

Collision of vessels—Proof of ownership—Damages recoverable.

In an action on the case for running down a ship, it appeared that the plaintiffs and no others were owners of the vessel at the time of the collision and in receipt of the profits; and that there was a deed of partnership, executed by some of the owners, but not by others, which provided for the mode of transfer.

Held, that the evidence given was sufficient proof of ownership as against a wrong doer; and that it was not necessary to produce this deed.

Held also, that the plaintiffs were entitled to recover for the cost of repairs done by the crew of their vessel.

The plaintiff, Sutherland, and twenty-four others declared in case, setting forth that they were lawfully possessed of a steamboat called "the Magnet," then navigating Lake Ontario; that the defendant was also then possessed of a certain other steamboat or vessel called the "Maple Leaf," upon Lake Ontario, and was navigating and managing the same by his servants and agents; that while the two boats were so navigating the lake; viz., on the 30th of April, 1852, the defendant by his servants so negligently, carelessly and unskillfully managed his vessel, that through the negligence and mismanagement of the defendant, and his servants, the Maple Leaf struck into, and ran foul of the plaintiffs, said vessel, and thereby then swamped the same and broke, damaged, and injured the said vessel, and divers of the goods and chattels of the plaintiffs then on board of her, whereby they became wholly lost to the plaintiffs; and by reason of the premises the plaintiffs then necessarily incurred expense to the amount of 600*l.*, in surveying and repairing the damage, and in preserving divers of the goods and chattels then on board her; and were deprived of use of the said steamboat for a long time, to wit, &c., and lost the use and advantage of their steamboat and the gains that would have accrued therefrom.

Pleas—1st. Not guilty. 2nd. Plaintiffs were not at the said time, when, &c., possessed of the said boat.

At the trial before Sullivan, J., at Hamilton, it was sworn that all the plaintiffs named, and no others, were owners of the Magnet at the time of the collision: that she was not then and never had been registered: that there is a deed of partnership which was executed by some of the

owners, but not by others, and which provides for the mode of transfer. It was positively sworn that the plaintiffs were then the owners and were the owners when the collision took place.

It was insisted by the defendant that the titles of the parties to their respective shares should be produced, as it was sworn that there had been a transfer of shares. The learned judge inclined to that opinion but reserved leave to the defendant to renew his objection in term as ground of nonsuit.

The jury found for the plaintiff and 600*l.* damages.

Vankoughnet, Q. C., moved to enter a nonsuit, pursuant to leave reserved; or, for a new trial without costs, on the law and evidence, for misdirection, and for the admission of improper evidence; or, that the verdict be reduced to 540*l.* 9*s.* 9½*d.*, or, to such other sum as the court might think fit.

He cited as to the proof of ownership *Robertson v. French*, 4 East. 130; *Sutton v. Buck*, 2 Taunt. 302; *Marsh v. Robinson*, 4 Esp. 98; *Thomas v. Foyle*, 5 Esp. 88; 2 Stark Ev. 801; *Abbott on Shipping*, 98; *Brancker v. Molyneux*, 3 M. & G. 84.

Cameron, Q. C., and *Hagarty*, Q. C., contra, cited as to the proof of ownership, *Tay. Ev.*, sec. 297; *Whitford v. Tutin*, 10 Bing. 395; *Abbott on Shipping*, 98, and the cases there collected. They argued also, that the evidence shewed this to be a case in which the plaintiffs were to some extent in the wrong, and therefore not entitled to recover—*The Friends*, 7 Jur. 307; 4 Moore, P. C. 320 S. C.; *Butterfield v. Forrester*, 11 East. 6; *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 246; *Luxford v. Large*, 5 C. & P. 421; *Pluckwell v. Wilson*, *Ib.*, 375; *Woolf v. Beard*, 9 C. & P. 373; *Vennall v. Gardner* 1 Cr. & M. 21; *Sorsbie v. Park*, 12 M. & W. 546; *Vanderplank v. Miller*, M. & M. 169; *Eberts v. Smythe*, 2 U. C. R. 189; *Sills v. Brown*, 9 C. & P. 601.

ROBINSON, C. J., delivered the judgment of the court.

We have considered this case carefully upon the evidence and are satisfied that we ought not to set aside the verdict

for anything that appears there in regard to the causes and circumstances of the collision; and we are satisfied that there was no misdirection by the learned judge. The case went in our opinion fairly to the jury.

The accident occurred at night. The Magnet coming up the lake; and her master seeing the Maple Leaf about six miles off, coming down the lake, and bearing three-fourths of a point off his starboard bow, might perhaps if it had been day-light, have continued outside, notwithstanding the statute regulations, assuming that the other clearly perceiving that such was his intention would not think it necessary to port his helm and cross the Magnet's track; but in porting his helm in good time, and observing the plain rule of the statute, he took the safe course; and if those in charge of the Maple Leaf had kept a good look out, they must have seen that the Magnet was observing the rule, and as they had ample time to do the same, they should have done so. The fact that they did come into collision in consequence of the defendant not following the rule, is strong evidence that it was a case to which the rule was intended to apply.

As to the allowance for the cost of repairs done by the crew of the Magnet we see no reason why the plaintiffs should not recover for them. If the plaintiffs had not had their boat thus disabled, their crew, whom they were bound to continue for a time on their pay-list, notwithstanding their vessel being disabled, would have been employed, as we may suppose, profitably for the owners, instead of receiving wages for repairing the damages which resulted from the collision. The question is one of fact—what amount of damages was done to the plaintiff's boat? and by proving that besides the moneys disbursed to others, it required so many days' work of the plaintiffs' servants to put her in a fit state for navigating, the plaintiffs certainly shew what was the extent of the damage for which they are entitled to recover.

We are also of opinion that the evidence of the title of these plaintiffs who are suing was amply sufficient for the purposes of this action. It was proved that they were in

actual possession as owners, using the boat for their benefit; that is proof enough of title against a wrong doer.

There is no doubt but the cases cited by Mr. Hagarty are good law, and binding upon us, which decide that when the plaintiff is himself substantially in fault he cannot recover for an injury partly occasioned by his own negligence, or want of skill; but the evidence does not show this to be a case for the application of that reasonable and well-established principle. The defendants here did not observe the provisions of the statutes either in regard to the lights which they carried, or the course which they took, and we think the fair inference is, that the collision arose from that cause. The plaintiffs observed the statutes in both respects. I had occasion in the case of *Eberts v. Smythe* (3 U. C. R. 189) to go at some length into what I take to be law in these cases, and need not go over the same ground now.

Rule discharged.

MILLER V. THOMPSON.

Set-off—Defence admissible under replication of nunquam indebitatus.

To a plea of set-off on a note, the plaintiff replied *nunquam indebitatus*—*Held*, that under this replication he was at liberty to dispute his liability on the note, by shewing that it was given by him to the defendant while they were in partnership, or the purpose of raising money to pay off a debt of the firm.

ASSUMPSIT on common counts.

Set-off was pleaded to the whole suit, and among the sums claimed to be due was one of 57*l.*, on a note of the plaintiff to the defendant, dated 12th April, 1851, and payable in ninety days.

At the trial, at Toronto, before Burns, J., the note was proved to have been given by the plaintiff to the defendant or order, on a partnership account against the plaintiff and the defendant while they were partners—*i. e.*, for stock purchased from one Appleton for the firm; and that it was indorsed by the defendant, who took it up when it came due by giving him a note for the amount.

It was objected by the defendant's counsel that, admitting these facts, the defendant would be entitled nevertheless to credit for it on the set-off, *nil debet* only being replied to the plea of set-off.

The plaintiff, on the other hand, contended that it was open to him on the pleadings to dispute his liability on the note, by shewing it to be a partnership transaction.

The learned judge ruled in favor of the plaintiff, reserving leave to the defendant to move to reduce the verdict.

J. Duggan shewed cause against a rule obtained accordingly; he cited *Brown v. Daubeney*, 4 Dowl. 585; *Stockbridge v. Sussams*, 3 Q. B. 250; *Harvey v. Hoffman*, 2 Dowl. N. S. 683.

Eccles, contra, cited *Jackson v. Robinson*, 8 Dowl. 622; *Briscoe v. Hill*, 10 M. & W. 735; *Fairthorne v. Donald*, 13 M. & W. 424; *Lackington v. Combes*, 6 Bing. N. C. 71; *Bell v. Shaw*, Holt 293.

ROBINSON, C. J., delivered the judgment of the court.

I do not see on what ground we could hold that the plaintiff was unable under his replication to resist the defendant's right to set-off the note. It is admitted that the new rules do not affect replications, and that a defendant may to a plea of set-off reply *nil debet*, as he might have done before. He was not, therefore, driven to reply specially that he did not make the note, which indeed would have been untrue; nor any defence which he could formerly have given in evidence under the general issue. Unless this be the case, I cannot comprehend what is meant by the universal admission that replications are not touched by the rules.

In *Gale v. Capern* (1 Ad. & Ell. 102), the defendant claimed to set-off a promissory note made by the plaintiff, and indorsed to him by the administrator of the payee. The plaintiff replied that the action did not accrue within six years. It was held that this replication admitted that the action had accrued at some time in the manner alleged, and left only the question upon the statute. Parker, J., said, "If you meant to deny that the set-off accrued to the defendant at all, you should have replied *something equivoca-*

lent to the general issue." I can understand that to mean nothing else than that under such a replication as is pleaded here the plaintiff could give in evidence anything that would repel the set-off upon the note (admitting the new rules not to apply to replications), anything that before the new rules, would in such a case have been an answer to the set-off. And I consider that undoubtedly, before the new rules of pleading, a plea of *non-assumpsit* or *nil debet*, to an action on a note, would have admitted the defence that has been proved in this case; namely, that the note was given by the one party to the other, and indorsed by the latter, merely to raise money upon it by discount, to be given in payment for a debt of the firm, to which both were equally liable—that it was a partnership transaction in which both concurred for the purposes of the firm, and formed therefore no ground for a charge by one against the other, otherwise than in a general settlement of their partnership dealings.

We think this defence was admissible, as it shewed that the plaintiff did not owe the defendant on account of that note. It would undoubtedly have been evidence under a plea of *nil debet* before the new rules, and is, therefore, we think, admissible under a replication to the same effect.

Rule discharged.

BROWN V. BROWN.

Arrest—Application to set aside process refused.

An order was made in chambers that a defendant arrested on a *ca. re.* should be discharged from custody, with costs, he undertaking to bring no action; and in the order leave was reserved to him to move the court to set aside the writ, and the arrest thereon, &c., if he should be so advised.

The court discharged a rule for this purpose; for the defendant having been released from custody, and being precluded from bringing an action, there could be no object served by setting aside the process.

The defendant had been arrested on a writ of *ca. re.* issued in this cause.

On the 5th of July, he obtained a judge's summons, upon which, on the 17th of July, an order of the Chief Justice of the Common Pleas was made in Chambers, that the defendant be discharged from custody, with costs, the defendant undertaking to bring no action—with leave to the

defendant to move this court in the next term to set aside the *ca. re.* and the arrest thereon, and subsequent proceedings not embraced in the order, if he should be so advised. Under this order the defendant was discharged from custody on the 21st of July.

Phillpotts, obtained a rule nisi to shew cause why the *ca. re.* and the arrest thereon, and all subsequent proceedings had thereon, should not be set aside for irregularity, with or without costs, on various grounds mentioned in the rule.

On the part of the plaintiff, in opposing this rule, it was sworn that on making the order for the defendant's discharge, it was left to the option of the gentlemen who attended on behalf of the defendant before the Chief Justice on the return of the summons, whether he would take the order without costs, or with costs on his undertaking to bring no action; that he preferred taking the order with costs upon such undertaking, and it was thereupon so issued.

Richards shewed cause and urged that the defendant having been discharged from custody, there could be no necessity, for this application, except to enable him to bring an action which he was bound not to do, having accepted the order with costs on those terms. He cited *Giraud v. Austen*, 1 Dowl. N. S. 703; *Griffin v. Dickenson*, 7 Dowl. 860. *James v. Kirk*, 1 Chy. 246.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we must discharge this rule. The defendant is bound by his undertaking to bring no action, having through his agent taken this order without costs upon those terms. Then, except for the purpose of harassing the plaintiff with an action, contrary to his undertaking, which we should certainly do nothing to facilitate, we can imagine no object he can have for desiring to set aside the process from which he has been discharged, and from which he can receive no further molestation. The learned Chief Justice of the Common Pleas declined setting aside the writ; and, though leave was reserved to the defendant, if he should be so advised, to move the court after-

wards—we see no propriety in his availing himself of that permission, and therefore discharge this rule.

There was no good reason for putting the plaintiff to the costs of this second application after the plaintiff had got all he could desire under the first.

Rule discharged without costs.

In re WILLIAM DICKSON AND THE MUNICIPAL COUNCIL OF
THE VILLAGE OF GALT.

Mandamus—Court of Revision—Taxation of Property.

The court refused to interfere by mandamus to compel a municipal council to alter the assessment of the applicant's property, as settled on appeal by a court of revision.

They also declined to express any opinion as to the principle to be adopted in the taxation of property—whether the intrinsic value only should be regarded, or whether the amount which it could be or has been leased for, or what it does in fact produce to the proprietor, should be taken into consideration.

In Trinity term last *Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why a writ of mandamus should not issue, directing them to replace the assessment on the assessment roll of the Village of Galt of the ratable property of the complainant, as the same was delivered in by the assessors of the said village before the revision and alterations thereof by the Court of Revision of the said Municipal Council, on the grounds disclosed in the affidavits and papers filed.

In March last, Mr. Dickson received from the assessor of the village of Galt the usual list of his assessed property in the village, in which list his real property there was valued in eight distinct parcels, making the total valuation amount to 3525*l.*, and the annual value 181*l.* 10*s.* On the 26th of July, a court of appeal or revision under the Assessment Act, was held for the purpose of hearing appeals from the assessors' valuation. Mr. Dickson attended, and objected that the court was illegal; but the court proceeded, and examined witnesses as to the value of his land, only one of whom was expressly sworn to give evidence in that particular case. The others had been sworn to give evidence in another case, but were not re-sworn.

In support of this application, Mr. Dickson filed his affidavit that one of the parcels of his real estate, viz. 130 acres in Galt, is used by him only for farming purposes; that the Court of Revision largely increased the valuation of his property (making it in the whole 9060*l.* and the annual value 575*l.* 18*s.* 10*d.*; and that he received from the clerk of the Municipal Council of Galt, on the 26th of July, a statement of his assessment when altered by the Court of Revision.

Affidavits were filed on the other side, which seemed to establish, that on a complaint or suggestion of three of the Municipal Councillors of Galt, that the property of Mr. Dickson and of others was undervalued in the assessors' roll, a Court of Revision was called according to law, and witnesses examined on oath, Mr. Dickson attending and cross-examining them; that the Court of Revision, on a consideration of the evidence, altered the valuation by increasing it as above stated, and that the sum required to be raised for the village of Galt had been computed upon the amended valuation, which formed the foundation of the rate per pound imposed. It was also shewn that the Court of Revision valued the property, not by taking the extreme estimate given by the witnesses, but keeping considerably within it. And several affidavits were filed which fully supported the valuation, if in this particular case, or in any case, it is the actual intrinsic value of the property which is to govern, independently of all extrinsic considerations, as, for instance, what the property could be, or has been leased for, how it is used and occupied, or what it does in fact produce to the proprietor.

IN THE CASES OF ABSALOM SHADE V. MUNICIPAL COUNCIL
OF GALT.

WALTER H. DICKSON V. MUNICIPAL COUNCIL OF GALT
and

EXECUTORS OF HON. ROBERT DICKSON V. MUNICIPAL
COUNCIL OF GALT.

Similar rules were obtained upon similar grounds.

In two of these cases it was sworn that large tracts of land which had been valued at 25*l.* per acre, and assessed upon the annual value computed at 6 per cent. upon such

estimated actual value, had been actually let at 20*l.* for the whole tract by the year, or at sums even less, and it was contended that it was manifestly illegal to assess these lands as being of an annual value so greatly beyond what they actually produce to the proprietors as landlords.

On the other hand it was stated in the affidavits, that in some of the cases referred to, the letting was a mere contrivance to avoid taxation; and it was contended, at any rate, that tracts of 20 acres in an incorporated village could not according to the assessment act be assessed as farm land, even if the proprietor chooses *bona fide* to lease it as such, being content to raise only such rent as a farmer would pay, but that it must be rated upon an estimate of its actual value as town property—that is, at what it could be sold for in village lots, or following the instruction in the statute, at what it would be fairly valued as if proposed to be taken in payment of a debt due by a solvent debtor.

Connor, Q. C., with whom was Irving, shewed cause, and cited *Rex v. the Brecknock Canal Co.*, 3 A. & E. 217; *Rex v. The Bristol & Exeter R. R. Co.*, 4 Q. B. 162; *Ex parte* Thompson, 6 Q. B. 721; *Ex parte* Nash, 14 Jur. 574; *Rex v. Hewes*, 3 A. & E. 725; *Ex parte* Stanford, 1 Q. B. 886; *Rex v. Commissioners of the Flockwood inclosure*, 2 Chy. 251; *Ex parte* Milner, 15 Jur. 1037; *Reg. v. The Justices of Yorkshire*, 13 Jur. 447; *Rex v. the Justices of Cumberland*, 1 M. & S. 190; *Ex parte* Becke, 3 B. & Ad. 704; *Rex v. The Justices of Suffolk*, 6 M. & S. 58; 13 & 14 Vic. ch. 67 secs. 16, 17, 28, 31, 32; and 12 Vic. ch. 81, sec. 170, were referred to in the argument.

ROBINSON, C. J., delivered the judgment of the court.

In reference to all these cases we find ourselves clearly unable, on a consideration of the affidavits, to grant the writ prayed for. We are clear that these are not cases for the remedy by mandamus, which goes only when the defendant is clearly competent to do of his own accord, and without a command, what it would be the object of the writ to compel him to do, and when it is clear also that it is his duty by law to do the act, and that he has been in due manner called upon, and yet has refused.

The affidavits filed on shewing cause so fully meet the allegations on the other side, of irregular proceeding, that if it were clearly part of our jurisdiction to correct irregularities in the mode in which the municipal bodies discharge their duties, and if a mandamus were the appropriate remedy, we should still feel that the ground for the application had been repelled; and it was indeed conceded on the argument that the affidavits filed on the side of the defendants, which have the merit of being drawn up with much distinctness and care, do not leave any of those grounds unanswered on which we could possibly interfere.

It was rather pressed upon us, however, at the conclusion of the argument, that although there are several reasons which disable us from making these rules for mandamus absolute, it would be satisfactory, and might be extremely useful, if we were to express our opinion upon the soundness or unsoundness of the principle on which the Court of Revision under the assessment law acted in these cases, in estimating the actual value of the real estate of these several applicants. Upon consideration, we feel it more proper to forbear intimating any opinion that we may have formed on that point. It is a question of which the legislature has not made us the judges, either in the first instance or by way of appeal from the valuation made by the Court of Revision; and where we have not the authority to control, we think we ought not to throw out opinions of which we cannot compel the adoption, and which, if we should happen to take a view of the matter different from that which has been generally acted upon, are might unsettle what has been hitherto acquiesced in, and lead to much public inconvenience. We are restrained too from giving an extra-judicial opinion in this matter by another consideration. The question of what is the proper principle of valuation is one extremely general in its application; it affects the pecuniary interests of almost every one, not excepting the judges themselves, and we should therefore not go out of our way to express opinions upon it. These rules must be discharged with costs.

Rules discharged.

McMARTIN V. McDOUGALL.

Chattel-mortgage—Registration—Computation of time.

On the 18th of July, 1851, one M. gave to the plaintiff to secure a debt, a bill of sale of certain goods, which was duly registered on the following day. On the 16th of July, 1852, he executed another bill of sale of the same tenor, but to secure a smaller sum—the goods assigned being, with a few exceptions, the same as in the first; this was registered on the 19th. On the same day, and before the registry, a *fi. fa.* against M. was placed in the sheriff's hands. There was not, in the case of either assignment, any actual delivery of the goods.

Held, that the *fi. fa.* was entitled to prevail; that the first bill of sale was waived by taking the second, and was therefore out of the question; though in any case it would have ceased to be in force after the 18th of July, and the second filing would have been too late.

This was an interpleader issue to try whether certain live stock, crops, farming utensils, and furniture, seized on a *fi. fa.*, as the goods of Colin McInnis, at the suit of McDougall, the defendant in this action, for 48*l.* 18*s.* 1½*d.*, were, or whether any of them were the goods of the plaintiff at the time of the delivery of the writ to the sheriff. The defendant pleaded that the said goods were not, nor any of them, the goods of this plaintiff, but were liable to be seized under a writ of *fi. fa.*

The plaintiff claimed under a bill of sale made by McInnis to him on the 18th of July, 1851, wherein it was recited that McInnis was indebted to him in 78*l.* 16*s.* 8*d.*, and in order to secure the same, had agreed to assign to him the goods named in a schedule annexed; and in consideration of that debt, McInnis thereby assigned to the plaintiff all the goods then being on the premises occupied by one Alexander McDonnell as owner thereof—viz., on lot 12, in the 1st concession of Charlottenburg, as set forth in schedule—to hold the same to the plaintiff for his own use. And it was witnessed by the writing that McInnis thereby gave possession of the whole to the plaintiff, by delivering to him on the day of the date one black horse. A schedule was annexed, specifying the goods and chattels in question in this action.

On the 19th of July, 1851, the plaintiff made affidavit before a commissioner, that the debt mentioned in the bill of sale was justly and truly due to him from the mortgagor therein named; that the deed was executed in good faith, and for the express purpose of securing the payment of

the debt, and not for the purpose of protecting the goods against the creditors of the mortgagor.—Execution was proved, and the assignment registered on the same day, the 19th of July.

On the 16th of July, 1852, McInnis executed another bill of sale of the same tenor, only reciting that it was made to secure a debt of 66*l.* 0*s.* 10*d.*, then due from him to the plaintiff. It made no mention of the assignment made the year before. The goods enumerated in the schedule to this assignment were, with a few exceptions, the same as those in the other schedule; some few items being omitted, and some new articles being introduced; It professed to assign as the other did, one half of the wheat, peas, oats, and potatoes, then growing, which of course could not be the same as were assigned by the former instrument. This deed was proved by affidavit made on the 17th of July; and the plaintiff made on the 16th of July, the usual affidavit of the debt being justly due; and the assignment was registered with the county clerk on the 19th of July. In this case, as well as the other, there was merely a symbolical delivery of the goods assigned. They all remained, in fact, in possession of McInnis, as before; and in the last mortgage as in the first, the assignment was stated to be made for securing the debt due; no time was set for paying the debt, nor any condition inserted expressly making the assignment void on the debt being paid. No attempt was made to impeach the *bona fides* of the assignment, on the ground of the debt not being a true debt.

It was proved that on the 16th of July, 1851, the plaintiff went with a second bill of sale to the clerk of the County Court to get it filed, but he had not then the necessary affidavit of due execution, and it was in consequence not filed. He went again, it seemed, on the 17th of July, which was Saturday, but not finding the clerk he did not leave the deed, but went again on Monday, the 19th of July, and filed it. This, however, was not until after the *fi. fa.* had (on the same day) been received by the sheriff.

It was objected by the defendant that the assignment was not a mortgage but an absolute sale, and that for such

purpose the affidavit was not correct according to the statute of 13 & 14 Vic., ch. 62; and that possession not being changed, all depended on registration.

The learned judge thought it sufficiently appeared to be a mortgage, and defeasible on payment of the debt though no time was limited. He held also, that as regarded the second assignment, the *fi. fa.* would be entitled to prevail against it, because it was received before that was registered, though on the same day: that as regarded the first assignment, it was required by the statute to be re-filed within thirty days next preceding the expiration of one year; and that upon the evidence it was shewn to have been re-filed too late for the purpose of keeping it in force.

The parties, however, consenting that the point should be reserved for the opinion of this court, with leave to enter a verdict for the plaintiff, if it should be found proper upon the evidence, this was explained to the jury, and they were desired to find for the defendant upon this understanding. The jury nevertheless determined to uphold the bill of sale against the legal objection, and persisted in returning a general verdict for the plaintiff.

Ross obtained a rule *nisi* for a new trial on the law and evidence; and because the verdict was perverse.

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think that the first bill of the sale ceased to be in force after the 18th of July, 1852, having been filed on the 19th of July, 1851; and the *fi. fa.* coming in while there was no assignment in force, was entitled to prevail. But it can hardly be said that there was room for any such question, for I do not understand that the sheriff seized anything that was not included in the second assignment, and the plaintiff, by taking that assignment, should be looked upon as waiving the first, for he admits by it that the right to transfer the goods was at that time in McInnis, and the first assignment should, we think, be put out of the question; however, upon the question of computation of time, we think the filing in 1852 was too late. This was not the re-filing of the first mortgage, such as is contemplated by

the third clause of the statute, but the filing of a new mortgage. The first was not kept alive, but was allowed to drop, so, that the case really after all does not turn strictly upon the question of computation.

Rule absolute.

STINSON V. BRANIGAN.

Bond—Pleading—Former recovery.

DEBT ON BOND. *Plea*—A former action on the same bond in a County Court, in which the defendant obtained judgment. *Replication*—that the breaches in this action, and the damage claimed, as different from those in the former action. In the first suit, as appeared from this plea, no breach was assigned but the non-payment of the penalty. *Held*, on demurrer, replication bad, for the plaintiff, having had judgment against him that he should be barred in his action on the bond, was precluded from suing again on it.

DEBT ON BOND.—The third plea set up as a bar a former action on the same bond in the County Court, in which the defendant obtained a judgment. (This plea will be found more fully set out in the report of a former demurrer in this case, ante 210.)

Replication—admitting that the plaintiff impleaded the defendant in that action for the detention in the same debt now claimed, but averring that the breaches assigned in this action, on account of which the debt mentioned in the said condition and the damages for the detention thereof are now sought to be recovered, are different breaches from those sought to be recovered in the former action, and on account of which the said action was brought.

Demurrer to this replication—on the ground that in the former suit, as appears by the defendant's third plea in this action, no breach was assigned in respect of the issue on which the defendant succeeded, except the non-payment of the penalty of the bond, which could only be once forfeited, and which forfeiture was admitted to be the foundation of such action.

Eccles for the demurrer.

Vankoughnet, Q. C., contra, cited *Palmer v. Temple*, 9 A & E. 508; *Bristowe v. Fairclough*, 1 M. & G. 143.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendant is entitled to judg-

ment on this demurrer to the replication to defendant's third plea; for in the former action the defendant had judgment that the plaintiff should be barred in his action on the bond; and that being so, he is not in a position to sue upon the bond against him, with a view of going for any other breaches than he may have had in his mind when he brought his former action; though, if he had obtained judgment on his bond, he might have suggested further breaches under the statute, and assessed damages upon them.

It is evident, besides, that in the former action the defendant did in fact set up his plea, on which he got judgment, what, if true, and if it were a sufficient defence, clearly was a final and total defence against the bond as to any breach that could be assigned under it.

That plea was demurred to, and was upheld by a court of competent jurisdiction as a sufficient defence.

Judgment for defendant on demurrer.

BRANIGAN V. STINSON.

The order of a judge of a County Court upon an application for leave to amend, is not an appealable matter.

This was an appeal from the County Court of the united counties of Wentworth and Halton.

The plaintiff demurred to the defendant's pleas, had judgment on his demurrer, and assessed damages.

A rule *nisi* to amend the pleas, and for a new trial, was discharged, and from the decision discharging this rule the defendant appealed.

Connor, Q. C., and Vankougnet, Q. C., for the appeal.

Eccles, contra.

ROBINSON, C. J., delivered the judgment of the court.

The only question in truth, before us in this appeal is, whether the learned judge of the county court did right in refusing leave to amend the pleadings after damages had been assessed, and declining to grant a new trial, which was only desired in case the amendment should be granted. We think the order of the judge upon application for leave

to amend is not an appealable matter, and that the refusing the new trial was the proper consequence of refusing the amendment.

This appeal must therefore be dismissed with costs.

Appeal dismissed.

HALEY V. ENIS ET AL.

Prescription—Pleading.

To an action on the case for penning back water so as to overflow the plaintiff's land, a plea of prescription was held bad—1st, For claiming the right by user for twenty years before action brought, instead of next before. 2nd, As claiming only a right to erect a dam of a certain height, without applying such defence to the injury complained of, or admitting the injury.

Case for erecting a dam across a certain stream, and thereby penning back the water, and causing it to overflow the plaintiff's land, situated above the dam.

Plea of prescription—stating that the defendants were and are occupiers of certain lands, and of a mill and mill-dam thereunto belonging, and built across the said stream below the lands of the plaintiff; that the said stream did for *more than twenty years before the commencement of this suit*, and at the said several times when, &c., run and flow through and past the said lands in the occupation of the defendants; that the defendants and others, the occupants of the said lands and premises, for the full period of twenty years and upwards before the commencement of this suit, had as such occupants actually used and enjoyed as of right, a right and easement of building and erecting a certain mill and mill-dam across the said stream, on the lands so occupied as aforesaid, of sufficient height to raise the water of the said dam four feet and three inches above the natural level of the said stream, for the better enjoyment of the water and the due working of their mill; and that the defendants at the said times when, &c., being the occupiers of the said premises, and having occasion to work the said mill, in the exercise of their said right, and because it was necessary to the due working of the said mill and the enjoyment of the stream, "*erected the said dam complained of by the plaintiff*, and have kept, repaired, continued, and maintained the same so erected of the height above men-

tioned and no higher ; that is to say, to raise the water at the said dam to the height of four feet and three inches above mentioned," &c., which are the said grievances, &c.

Demurrer to this plea—The objections relied on sufficiently appear in the judgment.

Wilson, Q. C., for the demurrer—The plea is clearly bad—it is taken very closely from the case of *Bowlby v. Woodley*, 8 U. C. R. 319, but there was no demurrer there.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this plea is insufficient. It does not claim the prescriptive right by user for twenty years next before this action brought, which is what the statute requires, but for twenty years before action brought, which may mean any twenty years however remote, and not continued down to the bringing of this action. Then it does not apply the defence to the injury complained of which is the backing water on the plaintiff's land, and does not allege that the defendants did that as of right for twenty years to the same extent as is now complained of ; but they treat the erecting of a dam on their own land as the whole injury complained of, and as being all that they have to answer. The plea does not admit that the defendants have at any time flooded the plaintiff's land, but claims only by a bad plea of prescription a right to erect a dam of a certain height, which, for all we know, may never have occasioned, and never can occasion the injury complained of.

Judgment for plaintiff on demurrer.

WILSON V. THE MUNICIPAL COUNCIL OF THE TOWN OF PORT HOPE.

12 Vic. ch. 81, sec. 198—*By-law—Pleading—Interlocutory judgment—Practice.*

Where interlocutory judgment had been signed, and a summons to set it aside discharged, and damages assessed, the court refused to entertain an application to set aside the declaration for irregularity, on account of its having laid the venue in a county different from that in which the summons was taken out.

It is not an inflexible rule, that on motion to set aside an interlocutory judgment, the court will not receive affidavits in contradiction to the general affidavit of merits.

Debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made.

Held, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal.

And *semble*, that although the statute enacts that all by-laws made and passed shall be authenticated, by seal, and signed by the person presiding, yet it is not necessary to set out these facts whenever a by-law is pleaded, but it is sufficient to aver that it was duly made and passed.

The plaintiff complained of the Town Council of Port Hope in an action of debt—for that whereas the defendants on the 1st of July, 1851, at, &c., *by a certain by-law then and there duly made and passed* by the defendants in council assembled, resolved, enacted, and declared that a public street or highway should be and was thereby established and opened in Port Hope, leading from, &c., to, &c., (describing it by courses and distances) of the width of 66 feet: that the road so directed to be opened went through the land of the plaintiff in Port Hope, and that thereupon the plaintiff, so being owner, &c.—viz., on the 20th of September, 1851, *gave notice in writing to F. E., then, and still being the clerk of the defendants, that he had appointed John Tucker Williams as his arbitrator, and that within three days thereafter one James Smith, then being the mayor of the said Council, acting under a resolution in writing of the defendants, named Henry S. Reid as the arbitrator of the defendants; and the said John Tucker Williams and Henry S. Reid, so being such arbitrators, within three days thereafter named one Henry Ruttan as the third arbitrator; and that afterwards—viz., on the 4th of November, 1851—the plaintiff and the defendants agreed to the appointment of the said John Tucker Williams, Henry S. Reid and Henry Ruttan, as such arbitrators, and authorized them or any two of them, to determine upon and award the damages, if any, to be paid by the defendants to the plaintiff for compensation for his land so taken for the said street, under the said by-law—so as the said award should be made on or before the first of January, 1852; that Henry S. Reid and Henry Ruttan having taken upon themselves the burthen of the said reference, before the 1st of January, 1852, and within three calender months after their appointment as aforesaid—viz., on the 1st of December, 1851—made and published their award in writing, of and concerning the said mat-*

ter so referred to them, ready to be delivered, &c., and did thereby award that the defendants should pay to the plaintiff 550*l.* as a compensation for his land so taken for the said highway by the defendants. By reason whereof, and by force of the statute in such cases made, &c., an action hath accrued to the plaintiff to demand of the defendants the said 550*l.*; yet that the defendants, although often requested, have not paid, &c.

The defendants appeared by their attorney, but suffered judgment by *nil dicit*. Damages were assessed at 574*l.* 15*s.*

The declaration was filed on the 28th of September at Cobourg. On the 5th October, 1852, being the last day for pleading, the defendant filed in the deputy crown office at Niagara a special demurrer, assigning such causes as are now moved on in arrest of judgment. Judgment was signed on the 6th of October, no copy of pleas having then been served, and the time for pleading being out. The defendants knew of this on the 13th of October, if not before, and on that day took out a judge's summons to set aside the judgment for irregularity, with costs, or to be allowed to plead on terms. On the 14th of October the summons was discharged with costs.

It seemed that the agent in Toronto of the defendant's attorney, to whom the declaration was sent with instructions to plead to it, supposed the papers of the cause were in the office at Niagara, as the venue was laid there; and on the 4th of October, he sent the demurrer there to be filed.

Notice of assessment of damages at Niagara on the 18th October was served.

Wilson, Q. C., obtained a rule nisi to shew cause why the declaration and all proceedings had thereon should not be set aside, because the summons issued from the office of the deputy clerk of the crown for Northumberland and Durham, and required the defendants to enter appearance there, and appearance was entered there, while the declaration, though it was also filed there, yet lays the venue in the counties of Lincoln and Welland—all the parties residing in the counties of Northumberland and Durham, and the cause of action having arisen there; or why the interlocu-

tory judgment should not be set aside, because the defendants were misled and prevented from filing a plea in the proper office, by reason of the plaintiff changing the venue in his declaration, without any order authorizing it; or why the judgment and all subsequent proceedings, should not be set aside on the merits, on the usual terms; or why certain orders of Mr. Justice Burns in this cause, or the last of them, and all subsequent proceedings, should not be set aside, because they excluded the defendants from pleading to the merits, and because affidavits were received in contradiction of affidavits swearing to merits, which is contrary to the practice; or why judgment should not be arrested, because the by-law is not shewn to have been under the seal of the defendants; and it does not appear that it was signed by the head of the corporation, or by any person on their behalf, or by the clerk of the corporation; or that the plaintiff gave notice to the defendants, or their clerk, of the purpose for which he had appointed an arbitrator; or that they knew for what purpose it was; or that the resolution mentioned in the declaration was under the seal of the defendants, or signed by the head of the corporation, or any one authorized, or by the clerk; and because it is not shewn that the agreement between the plaintiff and the defendants (to refer) was under the seal of the defendants, or signed by the head of the corporation, or by any one duly authorized.

The plaintiff made affidavit that the submission was written by the mayor himself and signed by him; that he remarked when he wrote it that he was unwell, and had not the seal with him, but that it made no difference, for that it was not necessary that there should be even a written submission. It was sworn that upon the written reference signed by the mayor of Port Hope and the plaintiff, an award was made, which the defendants afterwards moved the court to set aside, and obtained a rule nisi, which after argument was discharged: that, though the award was made in November, the rule nisi against the award was only taken out the last day of Hilary term, returnable in Easter term, which threw the plaintiff over the spring.

assizes; and that the venue was laid at Niagara, only because the plaintiff was not in time for the Cobourg assizes.

Cameron, Q. C., shewed cause, and cited *Yarborough v. The Bank of England*, 16 East 6; *Bird v. Higginson*, 6 A. & E. 827; *Faviell v. The Eastern Counties R. R. Co.* 2 Ex. 344.

Wilson, Q. C., contra, *Everard v. Paterson*, 6 Taunt. 645; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. The Mayor of Poole*, 4 M. & G. 860.

12 Vic. ch. 81, secs. 195, 198, and 14 & 15 Vic. ch. 109 schedule A. 27, 28, were also referred to in the argument.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that it is quite too late after the time that has elapsed, and after what has been done in this cause, for us to entertain an application to set aside the declaration for irregularity, on account of its having laid the venue in a county different from that in which the summons was taken out, and we see no reason to find fault with the course taken by the learned judge upon the summons that was issued in chambers on the 13th October last. It is complained that it was improper to receive on that occasion affidavits in contradiction to the general affidavit of merits, which had been filed in support of that part of the application which asked in the alternative for relief by setting aside the judgment and assessment and allowing the defendant to plead on payment of costs. There is no doubt that it is a rule by which the court and individual judges ordinarily govern themselves on occasion of such applications, that they will not enter into a consideration of the probable truth or falsehood of the defence which the party applying desires to have an opportunity of setting up, because that would be in effect trying the case upon affidavits without the intervention of a jury; but circumstances must occasionally produce a modification of the rule. The granting the relief asked for in all cases is an exercise of discretion in the judge, and as it tends to delay the plaintiff, and subject him to expense, it would be manifestly an unsound exercise of discretion to open the proceedings, if it be clear

that in the nature of things there can be no substantial defence, or if the effect of opening the case would be only to admit an unrighteous and vexatious defence.

The defendants in moving against the award, complained, as we know, that the plaintiff's land had been extravagantly valued by the arbitrators; but this court held that we could not overrule the judgment of the arbitrators upon the very point which they had to determine, and could not therefore set aside the award unless there was something so manifestly outrageous in the amount awarded that it supplied clear evidence of partiality or corruption. Looking at the affidavits that were filed, we could not treat the case as one of that description, and the award was therefore allowed to stand. This action is brought to recover the sum awarded; and it seems that, in order to apply any allegation of the defendants in moving to set aside the interlocutory judgment that the sum awarded was unreasonable, the plaintiff produced affidavits, probably the same as he had used in resisting the application against the award, supporting the justice of the award sued upon in regard to the amount at which the plaintiff's land had been valued. The learned judge who disposed of the application could not have been influenced by those affidavits, and he reports to us that he was not, because he did not look upon the question of proper value as one that was or could be material in the action; the award having settled that. He declined to set aside the assessment of damages, in order to let in a demurrer which he considered would be vexatious, and would be throwing an unjust impediment in the plaintiff's way after the parties had gone fairly to arbitration upon a submission which the defendants had treated as sufficient, and after the award had been held by the court to be conclusive as to amount. We think the course taken by the learned judge in this respect was proper. The corporation seems in this case to be struggling against a liability which the legislature has imposed upon them under the circumstances in which they have placed themselves; and, considering that the arbitrators are admitted to be gentlemen of unquestionable integrity and of intel-

ligence, one does not see who they should not have submitted. Whether the legislature have or have not sufficiently guarded the interests of the corporation by the provision which they have made in such cases is a point always open to discussion, but not in courts of justice.—We must give effect to the law as it stands, although in any case before us we may see reason to doubt whether the claimant has not been too liberally compensated.

This, however, is said without reference to the other part of this rule which relates to the arrest of judgment; but upon that point having compared the allegations in the declaration with the 195th clause of the statute 12 Vic. ch. 81, they seem to us to be sufficient. As to their having no allegation that the by-law authorizing the new street was made under seal, it surely cannot be in the mouth of the defendants to say that they took the plaintiff's property under an imperfect by-law of their own. By going to arbitration on the question of compensation, they admit that there was a case to arbitrate upon; and besides, I do not at present consider that the 198th clause of the 12th Vic. ch. 81, by enacting that by-laws *made and passed* by any municipal corporation shall be authenticated by the seal of the corporation and signed by the person presiding, renders it necessary to set out these facts whenever a by-law is pleaded. The provisions only shew what is necessary for substantiating the allegation in evidence. The plaintiff avers that a by-law was *duly made and passed* by the corporation; when the question arises how the by-law thus made and passed is to be authenticated, then this provision becomes material. In looking into cases in which by-laws have been averred in pleading, I find some cases in which they are averred to have been made under the common seal, and other cases in which that allegation is wanting. And, not being satisfied that it is indispensable I should not arrest judgment upon such an objection, but leave the party to his writ of error.

Upon the other ground—that the agreement to refer, or the appointment of an arbitrator, was not under the corporate seal, neither was necessary. The 175th clause of the municipal act already referred to, expressly provides

that the head of the corporation may appoint on behalf of the corporation. It seems to us, that all is averred in the declaration that is required by the statute, and that the case does not need the aid of the decision in *Faviell v. Eastern Counties Railway Co.* (2 Ex. 344), which was cited in support of it.

Rule discharged.

SMITH V. MCKAY.

Malicious arrest—Probable cause—Perverse verdict.

Case for malicious arrest—The defendant gave abundance of evidence to shew reasonable cause for believing that the plaintiff was about to leave the country. The learned judge left it to the jury to say whether they believed that the defendant received the information stated to have been given and whether he thought it to be true that the plaintiff was about to leave the province.

Held, that the jury should have been told that the plaintiff had not proved a want of probable cause.

The court, under the circumstances of this case, granted a second new trial, a verdict having been twice perversely rendered for the plaintiff.

CASE FOR MALICIOUS ARREST. 1st count alleging that no such debt was due as the defendant swore to.

2nd count, that the defendant had no reasonable cause for believing that the plaintiff was about to depart from the province.

Pleas—general issue; and other pleas traversing separately various allegations in the declaration.

There was abundance of evidence to shew that the plaintiff, who had been living on a place rented from the defendant, was removing his goods secretly: that he desired the persons to whose premises he took them to say that *they* were the owners of the goods; and that just before the defendant sued out the *ca. re.* he had been informed by several persons that the plaintiff was removing his things, and that they believed he was going away.

The learned judge left it to the jury to say whether they believed that the defendant received the information stated by the witnesses, and whether he thought it to be true that the plaintiff was going to leave the province.

The jury found that the information was given to him but that he did not act *bonâ fide* on that information (in other

words, that he did not believe it to be true) ; and they gave a verdict for the plaintiff of 25*l.* on the second count, and for the defendant on the first count.

Eccles moved for a new trial on the ground that the verdict was against law and evidence, and the judges charge.

Bell shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that in this case the learned judge should have told the jury that the plaintiff had not proved a want of probable cause, as regarded the swearing to the defendant being about to leave the province.

There was no reason to doubt that the defendant did receive information of the plaintiffs movements and probable departure, for not only the defendant himself has sworn that he did, but the person who brought him the information proved it at the trial. His attorney also was present when a person came expressly to give him warning ; and the attorney told him in consequence that he could properly make the arrest. The jury, indeed, found expressly that the defendant did receive the information ; and no suitor can be safe in acting under the law which authorizes arrest, if a jury are at liberty to surmise that the party did not believe what he was told, and what he swears he believed, when there is really nothing in the evidence to shew that he acted otherwise than sincerely, and when in the conduct of the debtor, as proved by himself upon the trial, there was every thing to create suspicion. There can be no question that if this defendant, upon the evidence that was given in this case, can be made to pay damages for having maliciously made an arrest without cause, the statute which authorizes an arrest for debt ought to be repealed, for it would be hardly possible to know under what circumstances a creditor could safely arrest a debtor. It would seem necessary that he should wait till he saw the debtor actually flying the country.

It seems the learned judge would have nonsuited the plaintiff, being strongly of opinion that want of probable cause was not shewn, but the plaintiff's counsel insisted on

going to the jury. He has by that means obtained a verdict which we think the law does not warrant on such evidence as was given. No doubt, although the existence of probable cause is a question for law, generally speaking, yet where there is a conflict of evidence, or where a proper foundation is laid by evidence for enquiring into the motives with which a party acted, the question may become a mixed question of law and fact: but in this case there was every thing to shew probable cause, and really nothing from which a want of such probable cause could be inferred.

We regret that we feel ourselves to be under the necessity of granting a second new trial; but parties using the legal remedies which are allowed to them for obtaining and securing their rights, are protected by certain legal principles against actions which may be vexatiously brought against them for pursuing their remedy; and it is our duty to give them so far as we reasonably can, the benefit of that protection.

Rule absolute.

HILARY TERM 16 VICTORIA.

Present—THE HON. JOHN BEVERLEY ROBINSON, C. J.

WILLIAM HENRY DRAPER, J.

ROBERT EASTON BURNS, J.

BUNNELL V. TUPPER.

Fixtures.

A barn, whether affixed to the soil or not, is, as between vendor and vendee of the land, a part of the freehold, and not a personal chattel for which an action of trover will lie.

G. died having a right of per-emption to certain lands. His executors disposed of this right to the plaintiff, who received possession of the land, and of a barn which was supposed to be on it. It turned out, however, that the barn stood partly on a highway, and partly on the defendant's land. The defendant removed it and the plaintiff brought trover.

Held, that the action would not lie.

This was an action of trespass, in which the plaintiff alleged that the defendant seized, took, and carried away

a *barn* of the plaintiff, and converted and disposed of the same to his own use. The pleas were—first, not guilty; and, secondly, that the barn was not the plaintiff's property.

At the trial at Hamilton, before Sullivan, J., the facts appeared to be these:

A person of the name of Gage (deceased), had been in possession of some portion of the Indian lands in and near the town of Brantford, which he used for agricultural purposes, and upon which he had built the barn in question. There was conflicting evidence as to whether the barn was built upon blocks of wood which were let into the ground, or whether the blocks of wood merely rested upon the ground, and in the course of time manure and refuse of agricultural products had accumulated around them. The weight of evidence was, that the blocks upon which the barn rested were merely laid upon the ground, and the building rested upon the blocks. The land in possession of Gage, and thus occupied, was claimed by him from the government—that is, when the government was disposing of the Indian lands in or near the town of Brantford, Gage claimed a right to them, upon some terms not material to this action to inquire. A portion of the land was granted by the government to Gage; and it appeared that before his death a right of purchase of some other part was recognized on the part of the government, and this portion was called the Hurlbut flats, and designated as Gage's pre-emption right. The pre-emption right had been surveyed on the part of the government, as part of the town of Brantford, and streets were laid out through it. After Gage's death, his executors, who were also devisees, disposed of the pre-emption right to the plaintiff. At that time a tenant was in possession of the land, and also using the barn; and he gave the possession by the direction of the executors to the plaintiff. According to the plaintiff's view of the case, he seemed to have supposed the barn in question was upon the land composing the pre-emption right. At all events he obtained possession of it from the tenant, and used it afterwards as a barn. The defendant, one of the executors, together with another of the executors, contended

that the barn was never intended to be sold, and was not sold with the land right to the plaintiff. In contradiction of this, the third executor said that at the time the pre-emption right was disposed of to the plaintiff the plaintiff was told that the barn was upon the land the right to obtain which was transferred, and that it was intended the barn should go with it. As a matter of fact, it turned out upon a survey being made, that the barn stood partly upon the land granted to Mr. Gage in his lifetime, and partly upon one of the streets which the government had laid out through the pre-emption right lands, and not upon the land the right to obtain which had been so transferred. After the plaintiff had used the barn for some time, and while he was absent, the defendant, contending that the barn had not been transferred to the plaintiff, caused it to be moved away, and to be placed upon his own land adjacent, which he had purchased from the devisees in trust under Gage's will, where he converted it into a dwelling house.

At the trial, it was contended for the defendant that the plaintiff's action would not lie—first, because under the circumstances the barn was a part and parcel of the freehold, and no action would lie for it in the nature of a trespass to personal chattels; and, secondly, that the title of transfer of the pre-emption right being in writing did not embrace the barn, supposing it were a chattel.

The learned judge was inclined to think that the barn should be regarded as a fixture, being a farm building intended for permanent use as such, and not for a temporary purpose, and not intended for removal, though built on blocks, as many dwelling-houses are throughout the country; but he left it to the jury to find whether the barn was erected as a temporary farm building or not. He also told them that if a chattel, though it would not pass by the deed, yet if clearly meant to be sold by the executors to the plaintiff, it might pass like any other chattel by delivery; and whether there was any such intention to sell the barn as a chattel, distinct from the sale of the land, he left to the jury.

It was contended on the other side, that if the trustees or executors were mistaken as to the locality of the barn, and

it afterwards turned out to be situate in the highway or on the other hand, the property would not pass by delivery of possession.

The jury found for the plaintiff and 20*l.* 6*s.* damages.

Freeman moved for a new trial for misdirection, and the reception of improper evidence, and on the law and evidence. *Connor*, Q. C., shewed cause. In addition to the authorities cited in the judgment—*Wansbrough v. Maton*, 4 A. & E. 884; *Dean v. Allalley*, 8 C. B. 743, 3 Esp. 11. were referred to.

BURNS, J., delivered the judgment of the court.

It is of no moment to inquire into the second question made at *Nisi Prius*; there was contradictory evidence whether the barn had or had not been disposed of to the plaintiff, and the jury having found for the plaintiff we cannot interfere on that ground, even if the plaintiff's evidence on that point were less strong than it is. The question between the parties must be, whether, under the circumstances, the barn must be treated and considered as part of the freehold, and for which a personal action will not lie. If it is to be so held, then the learned judge should have taken the matter entirely into his own hands, and it should not have been left to the jury to say whether the barn was intended as a permanent farm-building or erected for a temporary purpose only. Such a question may perhaps be asked of a jury, with a view of enabling the court to determine a question between a landlord and tenant, but this is a case of a very different description. If the executors of *Gage* had sold the barn *qua* such, independent of the pre-emption right, intending to treat it from the first as a chattel then the finding of the jury upon the second question would necessarily determine the action; but it is quite clear from the evidence on both sides that the plaintiff was not purchasing, and the executors were not selling the barn as a matter separate and apart from the right to the land. Supposing the plaintiff to be quite correct in believing that he was purchasing the barn with the land, and that the consideration he was paying was for the barn as well as the land, yet, if the barn was not situate upon the land, the right to

which the plaintiff was purchasing, the barn could not pass by means of the purchase supposing the barn to be part of the freehold. Whatever remedy the plaintiff may have to resist the fulfilment of an agreement under the circumstances, if the having of the barn formed an ingredient in the consideration he was paying; or whether he could claim compensation in equity, being willing to fulfil the agreement as to the residue; or whether he could sustain an action in the nature of a deceit for the value of the barn, if it were represented as being sold to him with the land—are questions which we are precluded from considering. The action is for having committed a trespass to a personal chattel of the plaintiff; and the single question is, whether under the circumstances the barn was a chattel.

In *Elwes v. Maw* (3 East. 38), Lord Ellenborough says—“Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons—1st. Between different descriptions of representatives of the same owner of the inheritance—viz., between his *heir* and *executor*. In the first case—*i. e.*, as between heir and executor—the rule obtains with the utmost rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. 2nd. Between the *executors of tenant for life or in tail and the remainderman or reversioner*—in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The 3rd case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.” If the barn in this case had been erected by a person who was merely a lessee of the premises, then the question would be, whether the erection was for the purpose of a trade, or for agricultural purposes, for there is a distinction to be drawn in this respect, even in the third case put by Lord Ellenborough. If the erection is for agricultural purposes, then it is, as

between the landlord and tenant; a question whether the building is attached to the soil or not; and if resting upon the soil merely by its own weight, or not attached to the soil in any way, the question is to be decided favourably to the tenant, and the question is not whether the erection was intended to be temporary, or so long as the tenant enjoyed the premises, or to enable him the more advantageously to carry on the business of farming. We know that farming operations cannot properly be carried on without sufficient barns; but if a tenant who takes a farm without a sufficient barn, being under no obligation to build and leave a barn at the end of his term, yet for his own convenience, and to render the farm beneficial to him, does build a barn, and attaches it to the freehold, he cannot afterwards remove it. If he takes care not to attach it to the soil, then it evinces an intention on his part, that he never intended it to be more than a personal chattel; and though it be necessary to enable him the better to carry on his farming operations, yet, as his occupation of the property is but temporary, the barn will be considered as but ancillary to the person, and not to the property. In the case of trade-fixtures erected by the tenant, though they be erected as attached to the freehold, yet they are considered as personal property, on the ground that they are ancillary to the trade carried on by the person, and not ancillary to the freehold. There is such distinction recognized between agricultural tenants and tenants who occupy for the purpose of carrying on trade. The present case, however, differs entirely from that between landlord and tenant. Gage, while the owner of the premises, erected the barn for agricultural purposes, and used it as such, and it seems to have been used for the same purposes as long as it was allowed to remain; though he did not attach it to the soil, he built it in the ordinary way that barns are in a great measure put up in this country, that is, rested upon blocks of wood. We can scarcely imagine that the proprietor thought, or contemplated at its erection, that if he died intestate or devised the land, the land would descend to his heir, or go to his devisee, and the barn would be-

come vested in his personal representatives; or that, if he were disposing of the land he would still have a right to remove the barn. If such a result must follow as a consequence because the proprietor did not let the blocks, of wood into the soil, or pin the building down to the blocks, we should be compelled to say that a very large proportion of the out-buildings of the farmers of this country, who are the proprietors of the farms they live upon, as well as in many cases even their dwellings—for it is notorious that in many parts of the province frame houses are merely rested upon blocks of wood, and log houses are rested merely by their own weight—as well as a very large proportion of the rail fences used for enclosing farms and dividing them into fields, which rest upon the ground without stakes to keep them down, are but personal property.

As in the case of the agricultural tenant, the point whether the tenant can or not removed fixtures is determined by the fact whether or not the erection is attached to the soil, so we find that, in case of proprietors or owners, the question where the fixtures are attached to the soil, whether they are to be treated as ancillary to the freehold, is to be determined by the nature of the property, the nature of the erection, and uses of them as connected with the property. *Lawton, executor of Lawton v. Salmon* (1 H. Bl. 259, in the note), is a case where the principal was a salt work, and it was held that the pans set upon flues or arches for boiling the salt water, though they could easily have been removed without injuring the building—yet, as they were ancillary to the freehold itself, they partook of the same nature. Then, on the other hand, where the proprietor erected machines for a trade carried on, though attached to the freehold, they were held to be personal property—*Trappes v. Harter* (3 Tyr. 603). Lord Lynhurst, in commenting upon the cited cases, says,—“Now these authorities lead us to the conclusion that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when this

can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate.

From these and other cases it is obvious that the position of the parties making and resisting claims for fixtures, the nature of the property to be enjoyed—that is, whether the land or freehold be the principal thing, or whether the trade carried on is so, as well as the nature of the erections, and for what purposes to be used as connected with the property—are all ingredients to be considered for the purpose of determining whether the erections are to be treated as partaking of the character of freehold or not. This case is rather to be governed by the authority of the cases as applied between the heir and the executor, though not of that character, but in fact is within another class of cases that apply as between vendor and vendee. It has been held that pales, posts, and rails for an inclosure, go to the heir—(12 H. 7, 26 B. Com. Dig. Biens.) There are many things which, if erected by the tenant, he may remove within his term, which, if erected by the landlord, would pass to the heir; or upon sale of the property, are held to pass with it—*Vide* Winn v. Ingilby (5 B. & Al. 625) Colegrave v. Dias Santos (2 B. & C. 76), Rex v. St. Dunstan (4 B. & C. 686). The question in Steward v. Lombe (1 B. & B. 506), was, whether a wind-mill constructed in the usual way, could be taken in execution in a case where the owner had mortgaged the land, and in the deed had also mentioned the mill, but which had remained in the possession of the grantor. Richardson, J., says, “Burgess being seised in fee of land and a mill, mortgages both. By abundant caution the mill is mentioned in the deed, but without that the mortgagee would have had it as part of his security. If Burgess had died, the interest in the mill would have descended to his heir; if he had conveyed the land, the purchaser would have been entitled to the mill, without any mention of it. It might have been otherwise, had Burgess as tenant for years erected the mill.” By virtue of these authorities, if the barn in question had been situated upon the pre-emption right, in the same

state as it was upon the other land, there can be no doubt that the sale of the land would have passed the barn without any specific mention of it, as a matter ancillary to the inheritance, because it was built for the enjoyment of the land by the owner, and for the purpose it was used, may be supposed to have been intended by him to be co-extensive with his interest in the land. In such cases there appears no more necessity for a physical annexation to the land to enable it to pass an incident, than in the case of rails for the purpose of an enclosure. In the case of the tenant occupying for purposes of trade, physical annexation does not constitute the erection part of the freehold; neither does it do so in the case of the owner who puts up erections as ancillary to the trade. In the case of the agricultural tenant, his intention whether the building shall be treated as a part of the free hold is evinced by the fact whether there be a physical annexation; but the opinions of the various judges, and the tendency of all the cases is, that in the case of erections by the freeholder or owner, it is the object and intention with which the building is erected, the use which it is put to, whether ancillary to the land or to a trade, whether the removal will cause an injury to the inheritance or not, all which, with the particulars of each case, that determine whether the fixture is to be considered as partaking of the character of freehold or personal property—that is, to which of them it is incident.

For these reasons we think that the barn in question did, notwithstanding that it was laid upon blocks resting upon the ground by its own weight, being built by the proprietor and used as ancillary to the inheritance, partake of the inheritance, and consequently that no action will lie for it, as for a *barn*, treating it as a personal chattel which would as by delivery.

The only cases which may be said to conflict with this view are those of *Rex v. The Inhabitants of London-thorpe* (6 T. R. 377), and *Rex v. The Inhabitants of Otty* (1 B. & Ad. 161), which would seem to decide, abstractedly, the point, that the mills there mentioned formed no part of the freehold, though erected by the owner. It is to be remarked

however, that in both cases the mills in question were treated rather in the light of being ancillary to some business to be carried on, than as incident to the land upon which they stood; and, if looked at in that light, then instead of conflicting with the view now expressed, they would rather support it, for the pauper could not gain a settlement by trade. The proper answer to be given, however, in such cases is expressed by Dallas, C. J., to be that each case must be determined upon its own merits, and "whether a particular thing be a fixture, is a mixed question of law and fact.

The impression of the learned judge, which he expressed to be, that if he were called upon to decide the matter himself, he would say that the barn in question partook of a freehold character, was in our opinion the correct view of the subject; and he would therefore have been fully warranted in telling the jury the verdict should be for the defendant, and he need not, under the circumstances, have left the question to them to say whether the barn was erected for a permanent or for a temporary purpose. There should consequently be a new trial without costs.

Rule absolute (a).

FOLGER ET AL. V. MINTON.

Notice of action—Replevin.

The statute 13 & 14 Vic. ch. 54, requiring notice of action, does not extend to actions of replevin.

Semle, that the plea of *non cepit* cannot be considered as the general issue in replevin, and therefore that if a notice of action had been necessary in this case, the want of it could not have been taken advantage of under this plea.

REPLEVIN—Plea, *non cepit* "by statute."

The cause was tried at Sandwich, in October, 1852, before McLean, J. It appeared in evidence that the plaintiff had made an agreement dated the 4th of August, 1851, with one McCallum, to make oak timber for them, to be delivered, on or before the 1st of June, 1852; and an agreement dated the 9th of March, 1852, with McCallum, that he should deliver to them 75,000 white oak staves on board, at 3*l*. 15*s*. per standard thousand: that a large quantity of

(a) See *Huntley v. Russell*, 13 Q. B. 576, and note *a* to the same case.

timber was made and called for by the plaintiffs, and received by them before April, 1852, and marked with their mark: that about 14,000 W. I. staves were made and drawn to a branch of the river St. Clair, ready for shipment; and that the plaintiffs had given McCallum the full value for them; but they were not called or marked in the plaintiff's name, nor did the plaintiffs actually take possession of them. The defendant seized the timber and staves, and was (as was sworn by the sheriff), in possession of the timber when the writ of replevin was executed. The defendant alleged to the sheriff that he had seized the timber under several writs of attachment issued out of the Division Court. This was the plaintiffs' case.

It was objected for the defendant, that under the statute 14 & 15 Vic. ch. 54, sec. 2, he was entitled to a month's notice of action. The learned judge decided that the cause must proceed, subject to the opinion of the court on this point, in case it was made to appear that the defendant acted as a person in the discharge of a public duty in this matter: and the learned judge further permitted the defendant to go into evidence of any special matter of defence under the plea of *non cepit*—treating that plea (for the time) as the general issue in the action of replevin. The defendant gave evidence that he was a constable for the township of Sombra, in the county of Lambton: that he had different warrants of attachments issued by a justice of the peace against the goods of McCallum, the aggregate of which amounted to 362*l.* 14*s.* 4*d.*: that he returned all these attachments to the clerk of the Division Court No. 5, on the 1st of June, 1852, and gave up to him oxen and other property seized under them. The timber and staves were in the schedule of property seized, but not in the schedule of property appraised—it could not have been removed to the clerk's, to be delivered to him without costing more than it was worth. The clerk never treated the staves and lumber as in his custody, as they had not been appraised, and he would not therefore accept the charge of them. The writ of replevin was served on the 4th of June, and the defendant, who was examined on the defence at the trial, swore that.

after making the return to the clerk on the first of June, he considered himself relieved from the charge. But on the other hand it was sworn that prior to the suing out of the writ of replevin he had forbidden the plaintiffs to take the lumber, as he had seized it, in consequence of which the writ was sued out; and the sheriff swore that on the 4th of June, when he replevied the lumber, it was in the defendant's possession. The jury found for the plaintiffs as to the squared timber, with 2*l.* 10*s.* damages.

The point submitted for the decision of the court was whether the defendant was entitled to the protection of the statute 14 & 15 Vic. ch. 54.

Wilson, Q. C., for the plaintiffs. *Crickmore* for defendant, 13 & 14 Vic. ch. 53, sec. 107; 14 & 15 Vic. ch. 54, and 14 & 15 Vic. ch. 64, were referred to in the argument.

DRAPER, J., delivered the judgment of the court.

There is at first sight much apparent force in the argument, that if it were held that the defendant were entitled to notice in a case like the present it would tend to deprive the plaintiffs of their remedy by writ of replevin; for as the writ only can be executed and the suit proceeded with by a replevy of at least some part of the property for which it is brought, it may well be that at the expiration of the calendar month all would be *eloigned*, and that no part of it would be in the possession of the defendant; and, applying this argument to the particular case, as regards a bailiff or constable executing an attachment issued under the Division Court Act—inasmuch as it is his duty immediately after seizure and appraisement to hand over the property specified in the inventory to the clerk of the Division Court, who is directed by the act to take the same into his charge and keeping—it is clear that if the bailiff obeys the statute no writ of replevin could be executed against him if a month's notice is necessary, for the property would by that time be in the possession of the clerk. I do not think, however, that this consideration can be allowed much effect upon the construction to be placed upon the 14 & 15 Vic. ch. 54.

Looking at this act, it appears clearly intended to consolidate and make uniform all the provisions of previous

statutes, which gave protection to magistrates and others acting within the scope or under the authority of those acts. It was not meant to deprive any party who had protection under previous statutes of *all* protection, but to substitute the protection given by this act for that given by previous statutes; it may be in some cases giving a greater, in others a less or modified protection, making it alike for all.

Going back then to the Division Court Act: Under its provisions the defendant would be entitled to a month's notice of action—sec. 107 is express to this effect; and if so, he is equally under the protection of the latter statute, and a nonsuit should be entered, unless the form of action being replevin make any difference. And as to this point the authorities seem all in favour of the plaintiffs—*Milward v. Caffin* (2 W. Bl. 1330), determined that replevin was not an action falling within the 24 Geo. II. ch. 44, sec. 6, by which officers acting under magistrates' warrants were protected from an action till demand made of the warrant. In *Pritchard v. Stevens* (6 T. R. 522), a question is raised as to whether goods taken under a warrant of distress, granted by commissioners of sewars, might be replevied in the hands of the officer; and the leaning of Lord Kenyon seems in favor of the affirmative. In *Harper v. Carr* (7 T. R. 274), Lord Kenyon expresses doubt as to the decision in *Milward v. Caffin*, saying that but for that decision he should have thought the act 24 Geo. II. did extend to a replevin. However, in *Fletcher v. Wilkins* (6 East 287), Lord Ellenborough, in giving the judgment of the court, expressly affirmed *Milward v. Caffin*; and in allusion to the doubt thrown out by Lord Kenyon, says—"the reason assigned by Lord Kenyon *ab inconvenienti*, has undoubtedly great weight; but on the other hand, it appears to us that the inconvenience of depriving the subject of his remedy by replevin is full as great, if not greater, for it may happen that no damages which a jury is properly authorized to give can compensate the loss of a particular chattel, which the owner may be forever deprived of, if he cannot sue a replevin," and the whole of Lord Ellenborough's reasoning on the particular provisions of the 24 Geo. II. as to the form

of plea, &c., applies to the case before us on our own statute; while his remarks upon *Pearson v. Roberts* (Wilkes 663) shews that it is not to be considered as an authority against the decision in *Milward v. Caffin*, which is indirectly upheld in *Hurrell v. Wink* (8 Taunt. 369), and is spoken of with approbation by Lord Denman, C. J., in *Governor of Bristol Poor v. Wait* (1 A. & E. 281). The language of our own act as to pleading "*the general issue, that he or they is or are not guilty,*" gives the strongest ground for the application of the English authorities as to the construction of this act, and leads to the conclusion that the defendant was not entitled to a notice of this action of replevin.

This makes it unnecessary to decide the question whether under the plea of *non cepit* the defendant could have given any special matter in evidence. My present impression is that he could not, as the words of the act are that he may plead the general issue only, that he is not guilty. I incline to think the proper construction of the act is to make a plea that he is not guilty a general issue in all actions brought against a party entitled to the protection of the statute. At all events, it can hardly be said that *non cepit* is the general issue, for it denies only the caption and detention, and leaves the plaintiff the possession of the goods which have been replevied, claiming no return of them, whatever the result of an issue on the plea; so that the plaintiff substantially recovers in the action, by getting back his goods at all events, which were the principle cause of his suing out the writ; and this is inconsistent with the idea of "general issue," which is generally understood to put in issue the plaintiff's right to recover anything in the suit.

It is impossible to read the statute of 14 & 15 Vic. ch. 54, without perceiving that its terms are general enough to include cases not falling within the scope of the statutes repealed in the first section, and not hitherto supposed to be of that description which the legislature have deemed entitled to such protection. Whether on a full and careful consideration it will be found to include any cases not within the language of previous statutes, we are not now called upon to determine.

Judgment for plaintiffs.

FLINTOFF V. DICKSON.

Partnership—Fi. fa.—Duty of sheriff.

The sheriff, on a writ of *fi. fa.* against B., one of a firm, seized his share of the partnership property. B.'s partner and D. R. & Co., notified the sheriff not to sell, and before any sale had been made D. R. & Co. placed in his hands an execution against the firm. Upon this last writ the sheriff sold the whole of the partnership effects, which realized only a small part of the claim; and to the first writ he returned *nulla bona*. B. had no property except his interest in the firm: and it was admitted that when the writ was delivered to the sheriff the partnership effects were insufficient to meet their debts.

Held, that the sheriff was not liable for a false return to the first writ, even for nominal damages.

This was an action against the defendant as sheriff of the United Counties of Lanark and Renfrew, for a false return to a writ of *fi. fa.*, at the suit of the plaintiff against one Thomas Brooke, indorsed to levy 37*l.* 13*s.* 3*d.* besides interest and fees, and placed in the defendant's hands on the 16th February, 1847. The declaration contains two counts:

1st. That Brooke had goods for which the amount might have been made, but the defendant did not nor would within a reasonable time levy the amount, but neglected and refused to do so.

2nd. That the defendant seized and took in execution divers goods and chattels of Brooke, to the amount indorsed upon the writ, but did not make the amount, and returned that Brooke had no goods or chattels.

The defendant pleaded—1st, Not Guilty. 2ndly. To the 1st count, that Brooke had no goods of which the defendant had notice, or of which he might, or could, or ought to have levied the amount. 3rdly. To the second count, that the defendant did not seize or take in execution any goods or chattels of the said Brooke, upon or by virtue of the plaintiff's writ.

At the trial, at the last assizes held at Perth, before Burns, J., the facts on both sides were agreed upon as follow:—That a writ of *fi. fa.*, at the plaintiff's suit for a debt due by Thomas Brooke individually to the plaintiff, was delivered to the defendant as sheriff, on the 16th of February, 1847: that at the time of the writ being so delivered, Brooke was in partnership with one Robert Gray, as merchants, the partnership possessing stock in trade and

goods to the value of 600*l.* and that the defendant as such sheriff, seized and took the partnership stock and goods upon the plaintiff's writ. It was admitted that before and at the time of the delivery of the writ to the defendant at the firm of Brooke & Gray owed partnership debts exceeding 4000*l.*: and that before the defendant sold the stock of goods, or any of them, he received notice from John Dougal Redpath, and others, not to sell, as the partnership debts for exceeded the value of the partnership property: and Gray & Brooke also forbade the defendant from selling. Before any sale took place a writ of *fi. fa.*, at the suit of Dougal, Redpath & Co., was, in May, 1847, placed in the defendant's hands against the partnership of Brooke & Gray on a judgment against them for a partnership debt. Upon this last execution the defendant sold the whole of the partnership effects, which realized 421*l.* 12*s.* 9*d.*, and still left due to Dougal, Redpath & Co. the sum of 3377*l.* 7*s.* 8*d.* Brooke was possessed of no other property than his interest in the partnership effects and it was admitted that Brooke and Gray were interested in equal shares. After disposing of the goods upon the execution of Dougal, Redpath & Co. and paying over the proceeds thereof to them, the defendant returned the plaintiff's execution *nulla bona*.

It was agreed to take a verdict in favour of the plaintiff for 51*l.* 8*s.* 11*d.*, subject to the opinion of the court whether under the facts stated and admitted, the defendant was liable to the plaintiff for any damages; and if not, then that a verdict should be entered for the defendant. It was further agreed that if the plaintiff had a bare right to insist upon a sale of the defendant's interest in the partnership effects, by reason of priority of execution, and an action could be sustained upon such bare legal right, so that under the circumstances a judge would direct a jury accordingly to find nominal damages, then the court should be at liberty to reduce the verdict to nominal damages.

Wilson, Q. C., for the plaintiff. Hagarty, Q. C., for defendant.

In addition to the cases referred to in the judgment, 1 Show. 173; 5 Jur. 651; Chapmam v. Koops, 3 B. & P.

289, were cited for the plaintiff: and Story on Partnership, secs. 261, 263; O'Connor v. Hamilton, 4 U. C. R., 243; Ventr. 402, for defendant.

BURNS, J., delivered the judgment of the court.

The first consideration is, what the sheriff could have sold had he proceeded upon the plaintiff's writ before the subsequent writ against the firm came into his hands and what benefit or advantage the plaintiff could have derived from a sale under his writ. By the rules of law as formerly held, the sheriff under an execution against one of two partners took the partnership effects and sold the moiety of the debtor, treating the property as if owned by tenants in common—Heyden v. Heyden (1 Salk. 392), Jacky v. Butler (2 L. Raym. 571), Pope v. Haman (Comb. 217), and other cases. The understanding upon the old cases, and as applied in practice, was, that the sheriff not only seized the *corpus* of the partnership effects, but actually sold the goods, or the moiety, or according as the partner's share might, be against whom the execution was. The rule of thus treating partners as tenants in common (not that the cited cases decided so, but the practice established upon the propositions stated seems to have established the rule) was obviously unjust. Each partner, of course, was liable for the whole debt due by the partnership: and if the effects could be held to be severable, so that a creditor of one partner could divide the goods, so as to be enabled to take a moiety or whatever the proportionate share of the partner might be, and make such proportion liable for the individual debts, without regard to the partnership debts, it must very materially affect the partner against whom there was no execution. For instance, suppose the partnership to be possessed of sufficient effects to meet all its engagements, but that one partner is greatly involved; if half of the partnership effects are liable to be disposed of to meet the individual debts of the involved partner, then the solvent partner is left with half of the effects to meet the whole of the debts due by the firm; and if that be insufficient, then as to the residue, he must, if he can, meet the debts from his own individual property, and thus he will be left with

a demand against his copartner for such portion of the goods so separated and divided from the partnership effects. But the principle now established and well settled, both at law and in equity, is that a separate creditor can only take and sell the interest of the debtor in the partnership property, being his share upon a division of the surplus after discharging all demands upon the partnership; and the *corpus* of the goods of the partnership is not saleable upon a separate demand—Fox v. Hanbury (Cowp. 445). Taylor v. Fields (4 Ves. 396), Dutton v. Morrison (17 Ves. 205), Holmes v. Mentz (4 A. & E. 131), Garbett v. Veale (5 Q. B. 408), Johnson v. Evans (8 Jur. 341). If the defendant had sold upon the plaintiff's execution, all that he could have disposed of would have been the interest of Brooke in the surplus after satisfying the partnership debts; and whoever became the purchaser must have proceeded to wind up the partnership affairs, to ascertain how matters stood, or what he had gained, as best he could. The next consideration is, what advantage this plaintiff could have derived under such a sale. It is stated in the admissions that the defendant seized and took the partnership goods upon the plaintiff's writ. That must be understood to mean no more than to such extent as the law would authorize, which, as before stated was Brooke's interest in the surplus after the partnership debt should be paid. As regards this, it is stated in the judgment of the court in Johnson v. Evans that "immediately the sheriff has seized the undivided moiety under the writ against the one partner, the judgment creditor becomes tenant in common with the other partner; and when the sheriff has sold, the vendee is tenant in common." The judgment further adds, "in every way of considering the case, the seizure of the whole, which is made of necessity, leaves the property of the solvent partner, and the possession also, which follows the property in the chattels just where it was before—that is, in the solvent partner." Now we find it stated in the admissions, that at the time the plaintiff's writ was placed in the defendant's hands, the partnership goods and effects were worth no more than 600*l.*, and the firm was indebted exceeding the sum of

4000*l.* It is therefore manifest the plaintiff could have derived no advantage whatever from a sale of Brooke's interest: and if such were the true state of the partnership matters, then the plaintiff has sustained no injury. It may be said that although the partnership did owe upwards of 4000*l.*, and had effects on hand to the extent of 600*l.* only, yet as between the partners themselves the whole of that 600*l.* might have been due to Brooke by reason of the other partner having withdrawn funds sufficient to satisfy the whole of the partnership debts; and Brooke's interest might have been much more than sufficient to satisfy the plaintiff's demand. That possibly may have been so; but if there were any reason for thinking it were, the plaintiff should have given some evidence to shew that there was some probability of the interest being of some value. The evidence from the admissions, however, warrants a contrary conclusion. The plaintiff's allegation in the first count is, that Brooke had goods from which the amount of the plaintiff's debt might have been made, but the defendant neglected to make the amount. As already established, it was only Brooke's interest in the surplus which the defendant could sell; and in the absence of any other evidence of the state of the affairs of the partnership than given, it is impossible to say that such interest could be the means of realizing anything upon the plaintiff's demand. The plaintiff undertakes to prove that Brooke had goods out of which the debt, or some part of it, could be made; but, so far as he has proved, the firm had only 600*l.* worth of property to pay 4000*l.* of partnership debts. Any advantage to be derived from becoming a tenant in common in such a concern must be purely imaginary. We think the plaintiff fails to establish any ground for recovery upon the first count.

The second count alleges a seizure and a false return. There was a seizure, no doubt, of the whole goods; but, so far as the plaintiff is concerned, as already shewn, the effect of that must be restricted to the interest of Brooke, as already explained: and the question then is, under the circumstances, whether, the plaintiff has a right of action. The question is, not whether the defendant was justified in

returning *nulla bona*, because it might possibly be, if he had promptly sold Brooke's interest upon the plaintiff's writ before the other writ came to his hands, that he could have realized something, and no matter how trifling it might be, the plaintiff would have a legal right to it. The sheriff would have no legal right to exercise a judgment, whether it were for the plaintiff's advantage or not, or whether he could be benefitted or not by a sale of Brooke's interest; it would be his duty to obey the process, without considering the consequences. If the action had been brought at a time when the state of the partnership affairs was uncertain, and it possibly might be that something could have been obtained for Brooke's interest, and if we must say that the law would presume some damage from a breach of duty, then the case would come within the doctrine of the cases of *Barker v. Green* (2 Bing, 317), and *Bales v. Wingfield* (2 N. & M. 831). Here, however, the case presents no difficulty, because the action is brought at a time when it appears what the state of the partnership affairs was at the time the plaintiff complains he was aggrieved. Assuming the evidence establishes that Brooke's interest was in truth worth nothing at all—and if there was any reason for believing it might be worth something, it was the plaintiff's duty to have adduced the proof, after shewing that the debts of the firm so greatly exceeded the stock in trade and goods—then the question really is, whether, now that we are informed of the true state of the partnership, we must notwithstanding, say the law will still, under the circumstances, presume some damage to have accrued to the plaintiff, because possibly something might have been realized upon the sale of Brooke's interest, if the sale had been made when perhaps the true state of the affairs was not known. Before we could presume that, either it must be shewn that Brooke had something which could be sold, or that the interests he had in the partnership effects might be something of value; for though the goods only amounted to 600*l.*, yet there were other assets which might have been applied to pay the debts of the firm. The evidence, however, negatives that Brook had anything which could

be sold, and it fails to establish that Brook had any interest in any surplus, because there is nothing whatever upon which to suppose or imagine there could be any surplus ; but the evidence is all affirmative the other way—that the firm was hopelessly in debt. It was incumbent upon the plaintiff to give some evidence to remove the presumption, which appears upon the admissions as they now stand, in the defendant's favour ; and he cannot resort back to what right of action he might have had if a return had been made before the sale of the partnership effects upon an execution against the firm for a partnership debt, which it is admitted was due at the time of the plaintiff's writ being placed in the defendant's hands. This proposition is founded upon the two decisions of *Williams v. Mostyn* (4 M. & W. 145), and *Wylie v. Birch* (4 Q. B. 565), which cases decide that an action cannot be maintained against the sheriff for a breach of duty, unless damages accrued thereby to the plaintiff. Upon the facts of the present case it is quite impossible it can be said the plaintiff had sustained any damage : on the contrary, so far as the facts admitted establish, it is proved he never could have sustained any damage. It is possible, as before remarked, that if Brooke's interest had been sold before the other writ came into the defendant's hands, it might perhaps have brought something, by reason of the purchaser, whoever he might have been, being ignorant of the state of the partnership ; but it is too late, after being made fully aware of the state of the partnership, to presume anything in that way now, and particularly as against this defendant, who, it seems, was at once, after the plaintiff's writ came into his hands, made aware that the partnership was greatly in debt beyond the assets.

Under these circumstances, we think the plaintiff should have proved facts from which to rebut the presumption arising that Brooke's interest was worth nothing ; or, in other words, should establish that he has sustained some actual damage, in order to render the defendant liable. We think a verdict must be entered for the defendant, although he may not have strictly performed his duty in not having exposed to sale the interest of Brooke upon the plaintiff's writ.

Judgment for defendant.

MARCH V. ALEXANDER.

Insolvent Debtors' Act, 8th Vic. chap. 48, sec. 24—Pleading.

To an action on a promissory note the defendant pleaded that after the contracting of the said debt, and before the commencement of the suit, a petition for protection from process was duly, and according to the form of the statute, presented by him to a judge of a county court, and filed in the insolvent court; and that thereupon, afterwards, and before action brought a final order for protection and distribution was made by, &c. ; and that the said debt, and every part thereof, was contracted before the date of the filing of the said petition in the said Insolvent Court.

The plaintiff replied that the promise in the declaration mentioned was made and the cause of action accrued, after the petition was *presented*—concluding to the country.

Held, on demurrer, replication bad ; plea good.

This was an action on a promissory note for £9 12s. 3d. by the payee against the maker.

Plea—That after the contracting of the said debt, and before the commencement of this suit—to wit, on the 10th of July, 1850—a petition for protection of the defendant from process was duly, and according to the form of the statute, &c., presented by the defendant to S. F. K., judge of the county court, and filed in the insolvent court; and that thereupon, afterwards, and before the commencement of this suit—to wit, on the 30th of November, 1850—a final order for protection and distribution was made in the matter of said petition by the said S. F. K., Judge as aforesaid, duly authorized in that behalf; and that the said debt and every part thereof was contracted before the date of the *filing* of the said petition in the said insolvent court.

Verification.

Replication—That the promise in the said declaration mentioned was made, and the cause of action therein contained accrued, after the petition in the said plea mentioned was *presented* as in the said plea alleged.

Special demurrer to this replication—assigning for causes, that it does not deny that the debt was contracted before the date of the filing, but merely alleges that the promise was made and the cause of action accrued after the petition was presented—whereas the statute 8 Vic. ch. 48, sec. 24, provides that if any suit or action be brought against any petitioner, for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in

bar of the said suit or action that such petition was duly presented, and a final order⁴ for protection and distribution made by a judge or commissioner duly authorized: that the plaintiff endeavored to make the time of the promise to pay material, while the provision of the statute relates merely to the time of contracting the debt.

Joinder in demurrer, with notice of the following exceptions to the plea—That it is no answer to the declaration, the cause of action therein stated having accrued to the plaintiff after the final order in the plea mentioned was made; also, that it is not stated in or by the said plea that the said debt in the declaration mentioned was included in the schedule of the defendant, or that the consideration for the making of the note was included therein.

Wilson, Q. C., for the demurrer, cited *Phillips v. Pickford*, 14 Jur. 272.

Dempsey, contra, cited *Beck v. Beverly*, 11 M. & W. 845.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the replication which is demurred to is bad. The defendant, in pleading his discharge under the Insolvents' Act, avers that the debt for which he is sued was contracted before he filed his petition. This was alleging that the statute requires in that respect, and all that it requires. He follows the statute precisely in making the act of *filing* the test.

The plaintiff replies to this, that the cause of action accrued after the petition was *presented*, and concludes to the country. In giving this answer he apparently admits what the defendant had averred, and contents himself with denying what the defendant had not asserted. It is as if he said, "your debt may have been contracted before your petition was filed, but it was not contracted before the petition was *presented*." If the presenting and filing were not the same identical thing, then the plaintiff was setting up a new fact in this replication, and ought not to have concluded to the country. In defence of the replication it has been urged that the filing the petition is necessarily the first act in point of time, and that after it has been filed

it is presented in its turn to the court or judge for consideration : that the presentation comes after the filing, and therefore if the cause of action accrued after the petition was presented, it must clearly have accrued after it was filed, so that asserting the one necessarily involves an assertion of the other. On the other hand, it may be urged that the insolvent presents his petition when he places it in the hands of the proper officer of the court, and that the filing it is an official entry of the fact of the petition having been presented ; that the acts may be generally simultaneous, or very near so, but that the filing may happen to be delayed ; that some hours or days may elapse between the two, and however short the interval, yet everything may turn upon it, as the filing is by the statute made the criterion. It is plain, however, that, taking it either way, the replication must be bad, because if we admit the plaintiff's argument to the fullest extent, it only proves that he could with truth have traversed the defendant's averment that the debt was contracted before the petition was filed ; and he ought to have done so, because that is what the statute requires. By departing from the question of fact as to the filing, and replying that the debt had not accrued before the petition was presented, he tenders an immaterial issue : for, according to his own argument, it could only be conclusive if it should be found one way. If the jury should find that the debt had accrued before the petition was presented, that might, according to the plaintiff's argument, have amounted to finding that it had not accrued before it was filed, if we are to take it that the filing must always be antecedent to the presentation. But if the jury should find that the debt had been contracted before it was presented, that would not, according to the plaintiff's argument, shew that it was contracted before the petition was filed, which is what the statute expressly requires.

On the argument, the plaintiff objected that the defendant's plea was bad. In considering any exceptions which have been so raised to the plea, the question, is, whether it is or is not sufficient in substance. Mere formal exceptions, that could only avail on special demurrer, will not be

fatal; and we must look at the plea, so far as English authority is concerned, with reference to decisions that have been made under the Imperial statute 5 & 6 Vic. chap. 116, sec. 10, of which the 24th clause of our statute 8th Vic. chap. 48 is a literal transcript, and not to decisions that have been made under previous acts, in which the provisions upon this point were different. Under our clause which I have mentioned, it is required, just as it is in the English act 5 & 6 Vic. chap. 116, sec. 10, that the defendant shall shew that the debt was contracted by him before he filed his petition, in which case his plea will bar the action if it shews that his petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, of which fact the production of the order signed by the commissioner, with proof of his handwriting, will be sufficient evidence.

Now, here the plaintiff in his declaration alleges that the defendant on the 2nd of October, 1850, made his promissory note to the plaintiff, or order, for 9*l.* 12*s.* 3*d.*, to be paid in two months from the date, (not having said what the date was). The defendant pleads that after the contracting of the debt, and before this suit—viz., on the 10*th* July, 1850, (which is repugnant if the note is to be taken as constituting the debt, for that is alleged in the declaration to have been made in October, 1850,) a petition for his protection from process was duly presented and filed, *and that afterwards*—to wit, on the 30*th* of November, 1850, and before this suit, which was commenced on the 23*rd* of September, 1852, a final order for protection and distribution was made by S. F. K., the judge of the county court, duly authorized in that behalf; and that the said debt, and every part thereof, was contracted *before the filing of the said petition*. It cannot be held that this plea is bad in substance if it contains what the statute says shall be sufficient to bar the action, which it is certain this plea does. If there must be other facts concurring, which the statute has not required to be pleaded—as, for instance, that the insolvent was a person who came within the statute; that he had resided twelve months within the

jurisdiction and had given due notice, and that the debt in question was included in his schedule—and if the want of any of these facts would be an answer to the plea (which I do not say it would) then the plaintiff should have replied so as to have brought out the objection. It cannot be said that the plea is insufficient on the face of it because it does not state all these facts, when it does state that which the statute expressly enacts shall be a sufficient bar—that is, a sufficient bar *prima facie*—and until some thing has been stated on the other side, which if true will repel the defence. But here the plaintiff, instead of demurring to the plea for any defect, has rested his case upon a denial of one part of the case only, tacitly admitting that in other respects the defendant could claim the benefit of his discharge. He objects only that this particular debt is not barred by that discharge, and by so pleading over he cures any defects in stating the fact of discharge generally, if the plea were otherwise open to objection of that kind; but the cases of *Cook v. Henson* (1 C. B. 908), and *Gillon v. Deare* (2 C. B. 309), are express authorities for holding this plea sufficient, and indeed the statute is so clear as to leave no room for doubt. In looking at English cases we must always distinguish between pleas under the 10th clause of 5 & 6 Vic. chap. 116, with which our 24th clause corresponds, and those under the 4th clause of the English act, which present a different question. The case of *Platill v. Bevill* (12 Jurist, 565) shews that there is nothing in the argument that the statute gives protection only against process against the person: it bars the action in clear terms.

As to the repugnancy in the plea stating that July, 1850, was after the debt was contracted, whereas the note is alleged to have been made in October, 1850, it is only an apparent repugnancy, the day not being positively alleged, but under a *videlicet*, and the defendant being at liberty under such an allegation to shew the petition filed and the order made on any other days.

Judgment for the defendant on demurrer.

TAYLOR ET AL. V. WHITTEMORE ET AL.

Deed of assignment—Provisions in—Change of possession only of part of the goods assigned, effect of as to registration—12 Vic. ch. 74, 13 & 14 Vic, ch. 62.

INTERPLEADER—The plaintiffs claimed under a deed of assignment by M. the execution debtor, to them of all his real and personal property, upon certain trusts. This deed provided for the payment, in the first place, to certain privileged creditors of the sums mentioned; and next to pay a rateable proportion to the same creditors, of the residue of their demands; and also a rateable proportion to all creditors who should within two months come in and execute the deed. There were also provisions—that if the trustees should think it advisable, and a majority, in value of the creditors signing the deed, should consent, they might carry on the business for the benefit of such creditors, employing M. for this purpose, and making him an allowance; that from time to time out of the proceeds realized they might purchase new stock, *but the business to be wound up, at all events within two years*; and that the trustees might permit M. to use such portion of his household furniture, for such time, and on such terms as they should think proper.

The furniture was left in M's possession, being used in rooms over the shop, where he continued to live—The deed was registered with the clerk of the county court, but was not accompanied by an affidavit verifying any debt.

Held, first, that it was properly left to the jury to say whether they believed that the assignment was in truth made for the benefit of the creditors, and that the plaintiffs had taken possession and were acting *bona fide* under it.

Secondly, that none of the provisions above mentioned could be considered as illegal, or affording evidence of fraud.

Thirdly, that although the deed, for want of such registry as the acts direct could have no effect with respect to the furniture, of which there had not been an actual and continued change of possession, yet that it was not thereby avoided *in toto*, or rendered invalid as to those goods which went into and remained in possession of the plaintiffs.

This was an interpleader issue, to try whether a certain quantity of merchandize, consisting of dry goods, in a certain store in King street, in the city of Toronto, were liable to be taken in execution as and for the goods and chattels of one John Robert Mountjoy, by the sheriff of the United Counties of York, Ontario, and Peel, by virtue of a writ of execution against the goods and chattels of the said John Robert Mountjoy, at the suit of the defendants, and delivered to the said sheriff on the 26th of April, 1852.

This case was tried before Burns, J., at Toronto, and the facts appeared to be these:—Mountjoy had carried on business in the city of Toronto for some years, and during that period had contracted a large amount of debts, which in April, 1852, he was unable to discharge. In the months of March and April, various creditors of Mountjoy took steps to enforce payment of their

demands at law. It appears that Mountjoy had indorsed notes for certain persons of the name of Howell, independent of his debts incurred in his own business, and these indorsed notes were being pressed on the part of the City Bank of Montreal. With a view to an arrangement of Mountjoy's business, there had been several consultations of his creditors. On the 27th of March, Mountjoy made the following proposal to the solicitor of the City Bank, viz., "I hereby undertake, in the event of the City Bank discharging me from all liability as indorser for Messrs. N. H. Howell, amounting to about £960, to make my debt to them, on which the said Messrs. N. H. Howell are indorsers, amounting to about £640, a privileged claim with others in any assignment I make of my estate and effects to trustees, for the benefit of my creditors; it being understood that, in the event of my furnishing an indorser satisfactory to the City Bank, the Bank will extend the time of payment for the term of three years—that is to say, will consent to divide the amount so secured into three payments, at one, two and three years respectively, to be paid with interest. I also undertake to make such an assignment, or to furnish approved indorsers, within the space of three weeks, and not in the meantime to give any confession of judgment, or do any other act, deed, matter or thing, to put it out of my power to carry this arrangement into effect. Mr. Wakefield is an indorser on one of my notes; it is understood that the City Bank do not discharge him or his estate from his liability to them on that note. The notes constituting the debt to be privileged are my notes to R. Wigham for £250, N. H. Howell £25, N. H. Howell £100, N. H. Howell £140, Ross, Mitchell & Co. £100, and an indorsement by me in favor of Robert Dodd £25; making in all £640." At the foot of this proposal, on the part of the creditors of Mountjoy, was written on the 27th of March, by Mr. Vankoughnet, solicitor on their behalf, as follows: "Upon communications which I have had with Mr. Mountjoy and the other creditors, I think there is no objection to Mr. M. carrying out the above arrangement." The city Bank accepted the proposal. Their solicitor proved that Mountjoy was very unwilling to

come to the arrangements proposed, and that in fact he was forced into making an assignment of his property by reason of the City Bank threatening to proceed against him and the Howells, but the Bank was willing, if Mountjoy would assign his effects and make the demands mentioned privileged demands upon his estate, to forgo their right to demand from his estate the amount of the £960 indorsations for the Howells, and that if Mountjoy would assign his effects, and so make those demands privileged, the Bank would look to the Howells alone for the £960. Mountjoy was, after the proposal made by him, reluctant to carry it out; and the Bank solicitor says he forced the assignment from him, when he failed to procure indorsers in order to obtain the benefit of the time which the Bank was willing to give. On the 12th of April, 1852, Mountjoy executed a deed of assignment to the plaintiffs, as trustees. The deed recited that Mountjoy was indebted to various parties mentioned in a schedule to the deed, which in the whole amounted to £5864 9s. 5d. and that, being unable to meet all the said liabilities in full, he was desirous of making an assignment of his lands and tenements, goods, chattels, and debts, to the plaintiffs, upon trust, and for the intents and purposes of payment, so far as the said property should extend, and subject to the charges in the deed mentioned: in the first place to pay to the City Bank of Montreal the sum of £640, in part payment of the debt due to the Bank; next to pay to the Bank of Upper Canada £500, in part of the debt due to that Bank; next to pay Messrs. Ross, Mitchell & Co. £300 of the debt due to them; next to pay to P. J. O'Neil £125 on a debt due to him from Mountjoy; next to pay to Messrs. Ross, Mitchell & Co. £62, being the amount for which one Miller had recovered a judgment against Mountjoy, and which Messrs. Ross, Mitchell & Co. had secured to Miller; next to pay Edward Patrick the sum £20, due to him on a note of one Robert Dodds, and endorsed by Mountjoy; next to pay Wilson & Bennett the sum of £40 8s. 4d. due them upon a note of Mountjoy; next to pay Robert Jones £20 due to him; and lastly, to pay Cochrane & Britten £40 due to

them; and after payment of these debts, then in trust for the payment ratably and proportionately of the respective debts stated in the schedule already mentioned, provided the creditors signed the deed within two months, and thereby released Mountjoy. The deed then, in consideration of the premises and of 10s. paid to Mountjoy, professed to bargain, sell, transfer, assign, and set over to the plaintiffs, their heirs, executors, administrators, and assigns, all and singular certain parcels of land therein described; and after describing the lands, then professed to transfer all and singular the goods and chattels, wares and merchandize, stock in trade, debts, securities, credits and moneys, and other the personal estate of him the said Mountjoy (saving and excepting his wearing apparel), and also to transfer all the remaining interest of him, Mountjoy, in the store and premises in King street, in the city of Toronto, where he then carried on, and had been for some time past carrying on the business of a dry goods merchant, and all the good-will and interest of him, Mountjoy, in the said business—the goods and other things being set forth in schedules to the need—to hold the same upon the trusts before mentioned, and to enter into the immediate possession. The deed provided for the trustees converting the estate into money, by sale of the same for cash, or on such credit as they might think proper; or if the trustee should think it advisable, and the creditors who might sign the deed, or a majority of them in value, should assent thereto, they might carry on the business for the benefit of the creditors who should come into the assignment, and they might employ Mountjoy in collecting the debts assigned, and in carrying on for the trustees, and the benefit of the creditors, the said business; and make Mountjoy such an allowance as the trustees might think proper, with the assent of a majority in value of the creditors; and from time to time out of the proceeds realized from the sale of the said stock and merchandize assigned, to add to the said stock as the trustees might think it advisable, until the same should be exhausted and disposed of, and then to wind up the said business, and to collect and get in all the debts due and payable to Mountjoy so assigned,

and all debts which might grow due in the carrying on of the said business, as soon as the trustees conveniently could; and at all events within two years from the date of the deed, unless the debts mentioned in the schedule should be sooner paid, satisfied, or discharged. The deed contained, besides, a release from the creditors of Mountjoy to him of their respective demands, and also contained provisions for selling the lands and discharging the incumbrances thereon, to pay expenses incurred, and that the trustees might retain five per cent. commission, and various other provisions respecting payment of the privileged claims and other debts, recovery of debts in Mountjoy's name, &c. &c.; also a provision that the trustees might permit Mountjoy to have, use, and occupy, so much and such portion of his then household furniture, and for such time, and upon such terms, as the trustees might think proper: this provision not in any way, however, to vest the property, or title in such property, or any portion of it, in the said Mountjoy.

The deed was executed the day it bore date, at the office of the trustees, and immediately after the execution the goods and merchandize in the store were delivered to the plaintiffs as such trustees; the clerks in the employ of Mountjoy previously were informed of what had been done and that from thenceforth, if they continued, they were to be in the employment of the plaintiffs. New books were got and opened, and the head clerk deposited the moneys he received daily in the Bank of Upper Canada, in the names of the plaintiffs. The key of the store was taken away by the plaintiffs on the day of delivery, and sent back the next morning to the head clerk; and the cash account of sales was constantly checked by the book-keeper of the plaintiffs' own establishment. The next day after the assignment all the creditors of Mountjoy were notified of what had been done, and some of them came in and signed the deed. The creditors assented to the employment of Mountjoy in carrying on the business, and accordingly he was employed. His name was not taken down from above the door, nor was any change made in the sign,

“The Golden Fleece,” nor any advertisement put in the newspapers that any change had occurred. The furniture was left in the possession of Mountjoy, it being used in rooms above the shop; and Mountjoy lived there after the execution of the deed—just as he had done before—using the furniture; and no possession specifically was delivered to the plaintiffs, or assumed by them of the furniture. The business apparently, so far as the public generally knew or were aware, was carried on as it had previously been. The trustees carried on the business after taking possession by immediately purchasing new goods and adding to the former stock; which purchases were made upon credit. After the execution of the deed the accounts rendered to customers for transactions after that period were made out in the name of “The Golden Fleece.” After carrying on the business for some time upon the old and the new goods added to the stock, the plaintiffs sold the whole out at 12s. 6d. in the pound, and realized £2,500. It appeared that the amount of the debt thus privileged was £1,750. The deed was signed by various creditors of Mountjoy, of whom by far the largest in amount was the firm of Messrs. Bowes & Hall. The amount due to them was £1,750, no part of which was provided for as privileged. The amount due to Messrs. Ross, Mitchell & Co., beyond the amount provided for by the deed as privileged, was £689. Mr. Mitchell proved that it was notorious that Mountjoy was about to make an assignment of his property, and he said that as a creditor he pressed the matter himself. By the arrangement which the City Bank agreed to, the estate of Mountjoy was relieved of £960 of liability, for which Mountjoy was liable for the Howells. The amount for which the defendants recovered their judgment against Mountjoy, was £267 11s. 7d, which demands were specified in the schedule to the deed. The trustees were creditors of Mountjoy, but not for any large amount.

The defendants refused to come into the assignment, but proceeded with the suit which they had commenced for the recovery of their demands, and on the 26th of April, 1852,

issued their execution against Mountjoy and the same day placed it in the hands of the sheriff who entered the store so previously in the occupation of Mountjoy, and seized the goods the same day

On the 4th of May, 1852, the deed of assignment was registered in the office of the clerk of the county court, but was not accompanied by an affidavit verifying the correctness of any debt.

At the trial *Hagarty*, Q. C., on the part of the defendants, objected as follows—1st, That it was under the statutes 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62, necessary in order to dispense with registration of an assignment, that the sale should be accompanied by an immediate delivery and followed by an actual and continued change of possession; and that in this case there was not such a change as contemplated by the legislature; and 2nd: That the deed of assignment was illegal and void upon the face of it, for several reasons—*first*, for providing for the employment of Mountjoy in carrying on the business; *secondly*, for providing that he might be allowed to retain possession of the furniture; *thirdly*, because it contained provisions for carrying on the business; and *fourthly*, as providing for the payment of certain debts in full instead of putting all on equal footing.

The learned judge overruled the objections, leaving it to the jury to say whether they believed the testimony of the witness, that the deed of assignment was in truth made for the benefit of the creditors, and that the plaintiffs had taken possession, and were acting *bona fide* under the deed to carry it out.

The jury found for the plaintiffs.

Hagarty, Q. C., (with whom was *M. Vankoughnet*), obtained a rule nisi for a new trial, in support of which he renewed the objections taken at Nisi Prius, and contended that the learned judge misdirected the jury, and should have told them broadly that it was a question for them to say whether, under the facts, the deed was or was not fraudulent; and should not have put the question to them to say whether the plaintiffs had taken possession of the goods

for the benefit of creditors, and were acting *bona fide* under the deed. He took also a further objection to the legality of the deed—namely, that it contained a provision for the party transferring the goods and chattels to remain in possession of a part, which, coupled with the fact that he did remain in possession of the household furniture, must render the deed void as to the whole of the goods and chattels, unless registered under the acts mentioned.

Cameron, Q. C., shewed cause. In addition to the cases cited in the judgment *Armstrong v. Moodie*, U. C. R. T. T. 7 Vic., was referred to.

BURNS, J., delivered the judgment of the court.

The first question, assuming that I took a correct view of the provisions of the deed of assignment, is whether I was right in submitting the question to the jury as I did, or whether I should have left the question broadly as one of fraud or not. There was no pretence for supposing that the witness swore to anything that was not strictly true; but it was necessary the jury should pronounce upon the truth of evidence, and I left it to them to say whether the deed and the taking possession under it was only a sham to cover the matter for Mountjoy, or whether there was an intention to carry out the provisions of the deed *bona fide* for the creditors; and if the jury were of the latter opinion, then, believing the deed did not disclose anything fraudulent upon the face of it, I did not see how the transaction should be avoided. If I had left the question broadly to the jury, as it is contended I should have done, it must have inevitably involved questions upon the terms of the deed, and the interpretation of those terms; and I think, how far they afford any evidence of fraud is a legal question belonging to the court. I find that in *Harland v. Binks* (14 Jur. 979), tried before Mr. Justice Wightman, he left the case to the jury to consider whether the deed was or not executed *bona fide* for the purpose apparent upon the face of it, and directed them if it was the deed a valid deed, although made for the purpose of defeating defendant's particular execution: but that if it was not made *bona fide*, for the purpose of an equal distribution among all the creditors, but only for the purpose of

defeating the defendant's execution, without there being any intention of an equal distribution among the creditors—then it was invalid as against the defendant. In *Janes v. Whitehead* (15 Jur. 612), before Maule, J., he seems to have left the case to the jury to say whether the deed was executed *bona fide* for the benefit of creditors. In *Coates v. Williams* (18 Law Times, 228), before Martin, B., he left it to the jury to say whether the deed was a *bona fide* one for creditors. In my opinion the question was rightly enough put to the jury, if there be nothing upon the face of the deed to render it illegal.

The next question is, whether there is anything on the face of this deed which should render it void, or from which to say there is evidence for a jury to pronounce the deed void. This branch of the case divides itself into three matters of consideration. The first is, whether the provision for a certain amount of the debts of Mountjoy to be paid in full, and as to the remainder a *pro rata* dividend from the residue of his estate, affords evidence of fraud within the provisions of the 13 Eliz. ch. 5. The giving of a warrant of an attorney to confess judgment for a debt due, in order to avoid another execution, does not come within the provision of the statute of Eliz.—*Holbird v. Anderson* (5 T. R. 235). In *Estwick v. Caillaud* (5 T. R. 420), Lord Kenyon said, "It was neither illegal nor immoral to prefer one set of creditors to another."—See *Meux v. Howell* (4 East 1). I know of no rule of law which compels that there should be an equal distribution of the assets provided for in a deed of assignment, in order that the deed should be valid. No doubt in most instances the desire of the debtor would be for an equal distribution of his property; and in most instances of the cases reported we find it is so provided; but that arises from the circumstances that it would be contrary to the provisions of the bankrupt laws were it otherwise. An equal distribution was not made in the case of Lord Abingdon, and yet the case was held to be good. The true criterion is whether the defendant has given up all his property to his creditors, and reserved nothing to himself, and that is the meaning of the expressions we see in the cases, of the pro-

perty being given up to be fairly distributed among the creditors, without meaning that there must be an equal distribution. No other meaning can be placed upon such expression, otherwise the proposition that it is legal to prefer one creditor to another, or one set to another is erroneously decided or founded upon some principle which governs in some cases, and not in others. If we keep in view that in this respect those who are not traders may do in the way of preference what those who are traders may not do, and apply the cases to the state of affairs in this country where, for the purposes of this question, all persons whatever are in the same situation, as not being considered traders, I think we shall find no difficulty. In the cases of *Eveleigh v. Purssord* (2 M. & Rob. 539), which was an interpleader issue tried before Rolfe, B., upon a deed which provided for the discharge of one debt without making provisions for other creditors, the learned Baron, now Lord Chancellor, uses this language: "The difficulty of solving the question, in a great measure arises from the equivocal sense in which the term 'fradulent,' was used on these occasions. In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest, and give him security which left his other creditors unprovided for; but that is not the sense in which (except in case of bankruptcy) the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such a way as he thinks proper. What is meant by an instrument of this kind being fradulent is, that the parties never intended it to have operation as a real instrument, according to its apparent character and effect." The same distinction between what persons who are subject to the bankrupt laws and those who are not, may do, is adverted to in the case of *Goss v. Neale* (5 Moore, 19). This last mentioned case bears upon the one before us very strongly, for the Hon. Wellesley Pole Wellesley had assigned his property to trustees for the benefit of creditors, for four years, stipulating that he might remain in possession; and the deed restricted the trustees from selling the property within two

years unless Mr. Wellesley directed them to sell. This deed does not exclude the defendants, but provides for them in the same way that it provides for others, whose debts are five times larger than theirs, and who yet have accepted of the provisions of the deed without complaint, so far as we are informed. As Lord Ellenborough said in *Pickstock v. Lyster* (3 M. & S. 371), "It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit." The creditor has no right over his debtor's goods until he puts an execution in the hands of the sheriff, and then, the goods being *bona fide* in the hands of other persons for the payment of debts due *bona fide*, as well as that due to the execution creditor, it is the latter who seeks to disturb the order of payment. It is a race between the different creditors; the debtor finding this, provides that the property shall all be appropriated among his creditors, but to be paid in the proportion he selects, and he chooses to pay some to a larger extent than others. The law allows this, and so long as we have no law providing for an equal distribution, as I before said, I know of no rule which prohibits those who are not traders from so dealing with their property: and as to traders, there is no distinction in this country from those who are not traders. If this be an unjust state of the law, it was for the legislature to apply the remedy. In *Owen v. Body* (5 A. & E. 28), there had been four debts for which executions were issued against the debtor, and which debts the trustees paid off before procuring the assignment. The deed provided for reimbursing them the full amount of the debts so paid before any division was to be made. In the three cases mentioned of *Harland v. Binks*, *Janes v. Whitehead*, and *Coats v. Williams*, the judges, in speaking of an equal distribution of the assets, only repeat what the different deeds in those cases contained, and by no means mean that if those deeds provided for an unequal distribution of the debtor's property they would have been void—that is, apart from the consideration of the bankrupt laws. It is the provisions of the bankrupt laws which interfere with holding deeds valid which provide for an unequal distribution of a debtor's property: but

under the statute of Eliz. so long as the property is disposed of fairly to meet debts, it is no consequence that some are paid in full before others ; and if some of the creditors can, by the good will of the debtor, obtain the property before others, there is no violation of the statute in their doing so.

The second consideration upon this deed is, whether the provisions for carrying on the business was a term to which the defendant had a right to object, as rendering them partners in the transactions. I must say I think that it is not open to that objection. This case differs from *Owen v. Body*, for in that case the provisions did not contemplate the winding up of the business, but rather was intended for carrying it on indefinitely. The provisions of the deed before us is for carrying on the business ancillary to winding it up, and in that respect it is like *Janes v. Whitehead*, and *Coats v. Williams*, and very like the latter case. The argument that the provisions of the deed before us constitute all the persons to it partners, is chiefly based upon the fact that it provides for new goods being purchased to be added to the old stock. That at first sight does appear startling. A provision was contained in the deed in *Coats v. Williams* for carrying on the business, and it was proved that the trustees replaced the stock out of the proceeds of the business : and Baron Martin was of opinion that it did not constitute the parties to the deed partners. I think upon principle the parties who have signed the deed could not be held liable, under and by virtue of the deed, for such purchases as the trustees might make. The deed does not give them a legal interest in the *corpus* of the estate assigned. The legal interest previously was in the debtor, and that legal interest he assigned, and transferred to the trustees upon certain trusts, and the creditors thenceforth had only an equitable right under the trusts to certain benefits and advantages, and in lieu of those they released Mountjoy from his legal responsibility to them. The creditors had no right to interfere in the selling or disposal of the goods in any way ; that part of the matter was vested in the trustees. The deed provides for the purchase of new goods from the proceeds of those then

in hand; and if the trustees purchased on credit, as it is said they did, I apprehend those who sold them goods could only look to the parties with whom they dealt, and the various banks and creditors who have signed the deed could not be held responsible to the vendors. It is not a case of agency; for, as I have said, the creditors have no legal right either in the goods assigned or that might be purchased. The provisions of the deed, however, leave it discretionary with the trustees to make new purchases to carry on the business, if they deem it advisable. The creditors signing could not, as it appears to me, be made responsible through the medium of the deed for any new goods purchased, for their interest in the new purchases and the old goods is not in the *corpus* of the goods, but it is an equitable interest dependant upon the execution of the trusts by the trustees. Their interest may of course be affected by the loss and gain the trustees may make; that is, the proportion the respective debts to be realized may be less or more as the trustees may be fortunate; but so long as the creditors have no legal interest in the *corpus* of the estate, and only have an equitable claim to call on the trustees to account, I can see no principle on which third parties dealing with the trustees could make the *cestui que trusts* to be partners, or could hold any other persons responsible for goods purchased than those parties with whom the individuals knew they were dealing. The deed provides for a continuation of the business not to exceed two years, thus shewing that the carrying on of the business was only ancillary to winding it up. The time required to enable the parties to wind up is tolerably well shewn by the fact that the City Bank was willing, if Mountjoy could carry on, to give him three years upon giving the Bank indorsers.

The next consideration is, the provision for the employment of Mountjoy, and allowing him to retain the furniture in the mean time. He was only to be allowed the use of the furniture if permitted; and when the business should be wound up, that part of the property of course must be disposed of with what might remain of the other. In the two cases of *Janes v. Whitehead* and *Coates v. Williams*,

similar provisions were held not to be objectionable. The employment of the debtor and his good will may be of the greatest service to the creditors; and if they were prevented from employing him because it would be deemed a badge of fraud, they might be deprived of the means of realizing a great proportion of their demands.

The remaining question is, whether the provision in the deed that Mountjoy should, if the trustees permitted him, remain in the use of the furniture, coupled with the fact that he did so remain in possession, and the fact that the deed was not filed on the 26th of April, when the sheriff went to seize, are such as will avoid the deed *in toto*, or render it inoperative only *pro tanto*. The statute declares that every sale of goods and chattels which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the *goods and chattels* sold, shall be in writing, and such writing shall be a conveyance under the provision of the act requiring mortgages of personal property to be filed; and that act declares that such conveyances shall be absolutely void as against the creditors of the party conveying, unless the conveyance, or a true copy thereof, together with an affidavit of a witness, shall be filed as directed by the act. I do not understand the provisions of the legislature to be levelled against the instrument or conveyance itself, but to be against the effect of it. For instance, the conveyance or sale would be good as between the parties themselves, or as against the strangers, whether the deed was filed or not. Again: the provision is whether the sale concerns goods and chattels. If the same deed embraces real estate, it will not be avoided as respects that portion of property conveyed, though it may not be effectual to convey the goods and chattels, by reason of not being filed. In this case real estate is conveyed by the deed in question. Again: the provisions of the legislature do not, in using the words goods and chattels, mean choses in action, though the title of the act is *respecting mortgages of personal property*. It is perfectly legal to assign debts due, and such debts are personal property, though not goods, or chattels of which there might be a delivery, which I

have no doubt was the meaning attached to the words by the legislature. The deed in this case assigns all Mountjoy's debts and choses in action, as well as choses in possession; and though it may be void as respects the choses in possession, I see no reason for saying that the deed is inoperative to pass all claim which Mountjoy had in his choses in action, though the transfer of these be included in what may be void. If the deed in such cases would only be void *pro tanto*, is there any sufficient reason for saying that in case of movable goods, where a part of them is delivered and another part is not so, the deed shall be void in respect of the whole of the goods, because it did not, for want of complying with certain requisitions of the law, effectually transfer a part? The statute recognizes a delivery and continued possession thereafter to confer title, and the object is to guard the rights of creditors and subsequent purchasers, and mortgages in good faith, against cases where a delivery and continued change of possession does not follow the sale. Before the statute, if a debtor made over to a creditor a quantity of goods, some of which he delivered, and the possession was changed, but another part of the goods the debtor was allowed to retain the possession of, so far as possession would afford any evidence of fraud it would be confined to the goods so allowed to remain in the possession of the debtor. It might be a question whether the whole transfer were a mere color or not, but I mean that in a case where possession is the only evidence of fraud, it could only apply to the articles so possessed; and if the transfer and delivery of part were in other respects valid, the fact of the debtor being allowed to retain a part would not again convert those goods which had been delivered into property of the debtor. I do not see that the legislature intended to alter that position, or that it was intended to do more than affect such goods and chattels as might be sold, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession. If the deed must be held to be void *in toto*, then the effect of the act in a case of this kind is to confer a right upon creditors which they had not previously. I do not read these acts as intended to confer

upon certain creditors or others any new rights, but rather it was intended, I think, to settle and define old ones, and to guard them against difficulties which were in fact, or at least were thought becoming exceedingly troublesome in the adjustment of the dealings of individuals with each other. The effect of holding the deed in this case to be void, would not stop short with creditors obtaining executions, as in this instance, but it would equally apply to the case of purchasers subsequently in good faith. The principle of law applicable to the transfer of choses in possession is, that such species or property is alienable by sale, or gift and delivery, though the property may be disposed of by deed. According to our statutes already mentioned, where the sale is not accompanied by immediate delivery, and actual and continued change of possession, the transfer must be by writing, filed as directed. Questions as to the effect of a delivery of part of goods, have perhaps been discussed more frequently where the right of stoppage *in transitu* is set up, than in any other case. In *Tanner v. Scovel* (14 M. & W. 28), where the question was, whether the delivery of a part of the goods had the effect of transferring the whole, C. B. Pollock, says, "we are all agreed that the delivery of part of the goods was not intended to be, and did not operate as, a simple delivery of the whole, but was a separation for the purpose of that fact only, leaving all the rest in *statu quo*." So in the case before us, the taking possession was confined to the goods in the store, and from the provision in the deed that the furniture might be permitted to remain in the possession of the debtor, it is clear that it was contemplated from the first there might be a separation, so far as affected an actual and continued change of possession, of different portions of the goods. In the case last cited, C. B. Pollock further observes, "if the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more: the right of lien and the right of stoppage *in transitu* on the remainder still continue." The deed here would, I think,

render the trustees purchasers of the property for a valuable consideration. They are creditors of the debtor, and they release the liability of Mountjoy, and in lieu thereof accept his property, and bind themselves by covenants to perform certain trusts to the other creditors in regard to that property, who in consideration of that release their demands against Mountjoy; so that, whatever may now become of the property, the debtor is released from all legal liability to the creditors, who have accepted the goods and effects upon certain conditions which the trustees are to perform. Whether such a transaction was the kind of value which would be sufficient to defeat the right of stoppage in *transitu*, was raised in *Jones v. Jones* (8 M. & W. 431), but it was not necessary to decide the point there, though in the judgment of the court B. Parke says "I forbear to give any decided opinion whether the plaintiff was entitled to the goods as indorsee for value of the bill of lading. If the deed of assignment contained a release of Lewis Thomas, I think he would be." In our case the deed does contain the release to Mountjoy of his liability. I assume from these and other cases, that there may be a transfer for valuable consideration which would be analogous to a sale, and that there may be in the taking possession of the things transferred a separation, which would vest title in those of which possession was taken, leaving the others in *statu quo*. A similarity may be derived from the cases decided upon bonds, which may be said in some respects to contravene statutes; and also upon bills of sale of ships, where for want of certain things required to be performed such instruments have not complied with the provisions of the statute.—*Mouys v. Leake* (8 T. R. 411), *Kerrison v. Cole* (8 East. 231). In these and other cases depending on the same principle, if the statutes upon which they depend declare that the instrument shall be void because it contains any matter contrary to the statute, then if found to be void in part it is void *in toto*. Unless, however, the statute goes to that extent, then if the matter which is the condition be divisible, and the good can be separated from the bad, the common law principle will prevail

unless it be clear that the legislature intended to alter the common law; or that the enactment must necessarily overrule it. In this respect, at the common law, there is a great difference between the consideration and that which is the condition of the consideration. If the consideration be void for illegality in part it taints the whole, and the instrument must fall *in toto*; but if the illegality be in the condition, or what is to be performed for the consideration, then, though the latter may be void in part, yet is not void *in toto*; and the common law principle will prevail in the construction of statutes, unless, as before mentioned, the statute evinces an intention to overrule the common law. Now in this case the consideration to the debtor was that by giving up his property he obtained a release from his creditors, and the condition of obtaining the release was that he should give up all his property. The deed provides that the creditors shall have all the debtor's property to satisfy their demands, and whether they obtain all or not, unless the debtor were guilty of fraud in concealing some part from them, the release of the debts would stand good. And such, I conceive, would be the result if the consideration were a money one, and paid for the goods; and though the goods were not obtained in part through the fault of the vendee, and by operation of law his title to such part of the goods as he had not obtained possession of failed, still the consideration would remain, and the vendee could not recover back a part of it because he had not obtained all the conditions for the consideration—Vide *Taylor v. Hare* (1 New R. 260), *Silk v. Hunt* (5 East. 449), *Reed v. Blandford* (2 Y. & J. 278), *Fitt v. Cassanet*. (4 M. & G. 898). The present case does not depend upon the deed alone as regards the title to some portion of the property, for there was a delivery and change of possession. It is true that without the deed, delivery of itself would have conferred no title; but with the deed, title would have passed whether there had been a delivery or not. This I mean independent of the effect of the statutes. Now, assuming this to be the state of the law at the time the statutes were passed, the question is, whether the legislature

intended to alter that ; and whether the words used must necessarily have the operation of altering the position of the parties ; and in a case where the transferee claims title through the medium of the combined effect of the deed and delivery, and continued possession of part of the goods, the title to the whole is destroyed because a part of the goods is left *in statu quo*, and dependent upon the deed alone. I cannot think the legislature ever intended anything so harsh ; nor do I think, though the language is, that the deed shall be absolutely void, that must necessarily be extended to cover everything mentioned in the deed which might be subject of delivery ; but I think it was meant to apply that the deed should be absolutely void as to such things the title to which depended upon the writing. I am of opinion that the effect of the act of parliament is confined to avoid the deed *quoad* the subject matter of the suit ; and if there is a delivery and continued actual change of possession of the subject matter of litigation in a case where there may be a separation and a complete delivery of part of the goods, it is no consequence that there may be some other choses in possession transferred by the deed, but as to which there was no delivery, nor any change of possession in order to complete the title.

As this action does not embrace any of the goods which were not delivered, but is confined to those of which the trustees took the possession, for the reasons I have given I think the verdict was right.

Rule discharged.

TAYLOR V. FLOOD.

Pleading—Evidence—Payment into court.

To an action of indebitatus assumpsit, defendant pleaded—1st. As to all but £106 ls. 11d. non assumpsit. 2nd. As to £28 12s. 6d. parcel, &c., payment—as to £77 9s. 5d. residue, &c., payment into court. Plaintiff took issue on the first plea ; traversed the payment alleged in the second ; and as to the third plea, took out the money which he paid into court.

Held, that it was open to the plaintiff on the general issue to prove a charge not covered by the other pleas ; and that the defendant, having sworn that he paid in nothing on account of that charge, was precluded from shewing that the other items which the plaintiff was entitled to would not cover the money paid into court.

ASSUMPSIT—The declaration contained several counts—for wages, work and labor, hire of horses, and on account

stated. Pleas—to all but £106 1s. 11d., and the causes of action in respect thereof, *non assumpsit*—as to £28 12s. 6d., parcel of the £106 1s. 11d., payment—as to £77 9s. 5d., residue of the £106 1s. 11d., and the said causes of action in respect thereof, payment of that sum into court, and a denial that plaintiff hath sustained damages to a greater amount than £77 9s. 5d., in respect of the causes of action in the introductory part of the plea mentioned, with a prayer of judgment if the plaintiff ought further to maintain his action in respect thereof. Replication, joins issue on the first plea—traverses the second—and as to the third the plaintiff accepts and takes out of court the said sum of £77 9s. 5d., in full satisfaction and discharge of the said causes of action in the introductory part of the plea mentioned: “therefore as to such last mentioned causes of action the plaintiff is satisfied, and he prays judgment for his costs and charges in this behalf.”

At the trial, at Hamilton, before Sullivan, J., on the plaintiff's own evidence, it appeared that the payment of the £28 12s. 6d., set out in the second plea had been made before action brought, and that the defendant had acknowledged he owed £77 9s. 5d., but disputed one item of charge for horse hire; and the plaintiff went into further evidence as to this particular charge, giving no evidence as to the residue of his account, except the defendant's acknowledgment that he was willing to pay as much as £77 9s. 5d. though perhaps he did not owe so much, but he would not pay the demand for thirteen and a half months' hire of a horse. On the defence the defendant, who also gave evidence in his own behalf, swore that he tried but could not get a settlement with the plaintiff; that he went to the plaintiff for the purpose of settling, and offered him £60, payable in instalments; that the plaintiff then claimed no more than £71; that the defendant being sued, determined to pay enough, and even more than he admitted was owed, into court, to cover all except this claim for horse hire, which he swore he did not mean to pay for, as he agreed with the plaintiff he was to have the horse for his keep. His counsel put questions in order to shew that the

other part of the account was charged too high, so that the money paid into court would overpay what was really due, apart from the disputed charge, and might be enough, perhaps, to satisfy any sum which the jury might think the plaintiff entitled to for the claim of horse hire; but the learned judge overruled this; and the case went to the jury with a direction that if they believed the defendant undertook to pay what was right for the hire of the horse, they should give the plaintiff a verdict for that amount; while if in their opinion the defendant was to have the horse for his keep, or if the horse was worth no more than his keep (of which there was some evidence), then the verdict should be for the defendant; and that on the issue of payment of the 28*l.* 12*s.* 6*d.*, defendant was entitled to a verdict. The jury found for the plaintiff on the first issue, damages 10*l.*; and for defendant on the second.

Martin, obtained a rule nisi for a new trial, for misdirection; and for the reception of improper, and the rejection of proper evidence. He principally relied on the effect of the plaintiff's replication taking the 77*l.* 9*s.* 5*d.*, out of court—in insisting that the plaintiff had debarred himself from any further claim. He cited *Mead v. Bashford*, 20 L. J. (Ex.) 190; *Story v. Finnis*, 20 L. J. (Ex.) 144.

DRAPER, J., delivered the judgment of the court.

On the pleadings there was an issue to be tried by the jury, and the replication to the defendant's third plea did not waive or supersede the necessity of a trial for this purpose, for the plaintiff only accepted the money paid into court in satisfaction of the causes of action in the introductory part of the plea mentioned, which are as to 106*l.* 1*s.* 11*d.*, while the general issue is pleaded to all but the 106*l.* 1*s.* 11*d.*, and the question remains whether the plaintiff has a cause of action not covered by the 106*l.* 1*s.* 11*d.*, and the causes of action covered by that sum. This question arises entirely upon the evidence. As the pleadings stand, the declaration is large enough to enable the plaintiff to establish a claim beyond the cause of action admitted, and if the evidence does establish this, there is nothing in the form of the pleadings to prevent his recovery—*Cauty v. Gyll*, (4 M. & Gr. 907) clearly shews this.

Now, upon the evidence nothing can be clearer than that the defendant did not pay the money into court to satisfy the plaintiff's claim for the hire of his horse, for the defendant expressly denied all liability on this item, and the plaintiff's evidence was given to establish it. This was the whole question for the jury on the plea of non-assumpsit. The defendant selected this item from the plaintiff's account as the one which he would deny, and himself applied his payment into court to all the other items. After this he cannot, I think, be permitted to turn round, and insist that because the particular item *might*, according to the form of the pleadings, have been part of that to satisfy which he paid money into court, the court and jury were bound to disbelieve his own assertion to the contrary, and to find this item satisfied, because the plaintiff did not give evidence of other items amounting to £105 1s. 11d. The third plea was an admission that the plaintiff had some cause of action for which he was entitled to recover to the amount of £77 9s. 5d., and the evidence clearly shewed that such admission was not intended by the defendant to extend to the hire of the horse. The admission was therefore of the plaintiff's right exclusive of this latter claim, which was properly left to the jury. The case of *Story v. Finnis* (20 L. J. Ex. 144, 6 Ex. 123), relied on in the argument, is clearly distinguishable, while the case of *Rumbelow v. Whalley*, of which a short note is given in 12 Q. B. 1042 (a), strongly supports the opinion already expressed, that there is nothing in the form of the pleadings in this case to prevent the plaintiff's recovery; and *Holland v. Hopkins* (2 B. & P. 243) in principle supports the view he contends for. The rule will therefore be discharged.

Rule discharged.

GUNN V. DICKSON, PLAYTER, ELGIE AND BELL.

Action against Carriers—Non-joinder—Evidence of improper conduct. In an action against four, the declaration stated that the defendants were proprietors of a common stage coach for carrying passengers from T. to B.; that they received the plaintiff as a passenger for certain reward in that behalf; and by reason thereof it became and was the defendants' duty to use due care and diligence in conveying the plain-

(a) Now reported at length in 16 Q. B. 397.

tiff; yet they, not regarding their duty, did not use due dilligence, &c., but by reason of the carelessness and improper conduct of the defendants by their servant in conveyance of the plaintiff, he was thrown off of the said coach and injured, &c.

Held, that upon this declaration a verdict might be given against three of the defendants, and for the other.

Held, also, that negligence and improper conduct were sufficiently shewn by the evidence.

The plaintiff declared that before and at the time of the committing of the grievances, &c., the defendants were the proprietors of a common stage coach, used by them in carrying passengers from Toronto to Bradford for hire; that the defendants being such proprietors, to wit, on the 2nd of September, 1852, received the plaintiff in their coach as a passenger to be carried from Toronto to Bradford, for reward to the defendants in that behalf; and by reason thereof it became and was the defendant's duty to give due care and dilligence that the plaintiff should be conveyed from Toronto to Bradford as aforesaid, as such passenger by the said coach; yet, that defendants, not regarding their duty in that behalf, did not use due care in causing the plaintiff to be conveyed from Toronto to Bradford as such passenger by the said coach, and then conducted themselves so carelessly and improperly in that behalf, that by reason of the carelessness and default, and improper conduct of the defendants, by their servant, in conveyance of the plaintiff &c., he the plaintiff was then thrown off the said coach and cast upon the ground, and greatly bruised, &c.—laying special damage.

The defendants pleaded—1st. Not guilty—2nd. That they were not, nor was any or either of them, at the said time when, &c., the proprietors or proprietor of the said stage coach in manner and form, &c.—3rd. That the defendants did not, nor did either of them receive the plaintiff upon the stage coach as a passenger, to be carried or conveyed as in the said declaration mentioned.

At the trial, at Hamilton, before McLean, J., there was positive evidence given that Playter, Dickson, and Elgie were proprietors of the coach at the time. There was no evidence to shew Bell a partner, and therefore he was acquitted.

The accident seemed to have been occasioned by a fore-wheel coming off, not being properly secured, according to the evidence of the driver in charge. The nut was known to be loose—a pin or key was put through the axle, but it was not secured by a leather running through the end of it, as the others were, and it came off. The stage was overturned, and the plaintiff, who was sitting outside, was hurt. At the time of the accident a passenger was driving, and there was evidence that he was driving fast down a declivity, the horses cantering.

A verdict was given for the plaintiff for £25, against Playter, Dickson, and Elgie; and for the defendant Bell.

Eccles moved for a new trial on the evidence. He contended that in this action the plaintiff could not recover against some of the defendants only, but must succeed against all, or could not recover against any—*Wilkes v. Flint*, 4 O. S. 19.

2ndly. That the evidence did not support the declaration in regard to the cause of the injury.

3rdly. That the evidence did not prove the defendants to be liable—they were not shewn to be the proprietors.

Cur. adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

We think there is no legal difficulty in this case. Upon a declaration framed as this is, the plaintiff may properly be allowed to recover against one or more of the defendants, though he may fail against the others. The case of *Brotherton v. Wood* (3 B. & B. 54), is perfectly similar, and was well considered—*Govett v. Radnidge* (3 East. 62), *Ansell v. Waterhouse* (6 M. & S. 385), and *Pozzi v. Shipton* (8 A. & E. 963), all equally support this verdict against the objection of non-joinder. Then, as to the evidence: It cannot be said that the verdict against the three who were found guilty, is contrary to evidence, or without evidence; for it was sworn by their driver that they were the proprietors, and the defendants in moving against the verdict have not denied it.

As to the case on the merits: The declaration charges in

general terms that from the carelessness and improper conduct of the defendants and their servants the plaintiff was thrown from the coach, and much injured. It was negligence and improper conduct to allow a stranger to drive. There was evidence that he was driving too fast down hill when a fore-wheel came off, which may well have occurred from the jarring occasioned by the too rapid motion displacing the lynch-pin which confined the wheel. The driver knew, as he swears, that the nut which kept on that wheel was loose; and yet relying as he did on the lynch-pin, he knew also that that pin was not secured as is usual, and as the others were, by anything put through the end of it which would prevent its coming out. We think the evidence sufficiently accorded with the declaration. It has been held to be in such cases sufficient *prima facie* proof of negligence that the coach breaks down, until it shall be shewn that the fact arose from some defect which with common care could not be detected, as by the axle-tree suddenly breaking where there was no flaw visible.

Rule refused.

REGINA V. DEANE.

An indictment for receiving stolen bank notes did not conclude *contra formam statuti*: *Held*, bad.

The defendant was indicted at the quarter sessions for the county of Middlesex for unlawfully receiving certain bank notes, the property of one William Slee, by a certain person to the jurors unknown lately before feloniously stolen, taken, and carried away. The indictment did not conclude against the form of the statute, and on that ground *Becher*, for the defendant, moved after a verdict to arrest the judgment. The point was reserved for the opinion of this court.

ROBINSON, C. J., delivered the judgment of the court.

The only question can be whether the effect of either the 46th or 47th clause of 4 & 5 Vic. ch. 24, is to cure the exception. They are in the same language as the corresponding clauses in the English statute 7 Geo. IV. ch. 64, secs. 20, 21; and in *Pearson's case* (4 C. & P. 572, & 5 C. & P.

121) it was held by all the judges that those provisions did not dispense with the necessity of laying the offence to be against the statute, where it was not an offence at common law. We must be governed by this authority, for it is plain that but for the statute, which makes it an offence to steal bank notes, it could be no crime to receive them knowing them to be stolen; and I do not indeed see how it happened that this offence was not charged as a felony under the 46th clause of our statute 4 & 5 Vic. ch. 25.

REGINA V. WALKER.

An indictment for obtaining money under false pretences, must conclude, *contra formam statuti*, and must state to whom the money belonged.

Indictment for obtaining money under false pretences—without any conclusion *contra formam statuti*. This exception was taken by *Becher* for the defendant at the quarter sessions, in London; and also another exception—that it was not averred that the moneys obtained by such false pretences were the moneys of Joseph Seabrook, the person alleged to have been defrauded.

The judgment was stayed, and points reserved for the opinion of this court.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt that the indictment is insufficient, and we think on both grounds. Such a false pretence as is set out in the indictment comes clearly under the statute 30 Geo. II., ch. 24, and our own statute, but would not be indictable at common law; and this being so, the same necessity exists in this case as in the other, against Deane, of charging that it was against the form of the statute. And upon the other point—that the indictment ought to have alleged the money obtained by the false pretence to have been the money of the person defrauded—the case referred to by Mr. Becher, of the *Queen v. Martin* (8 A. & E. 481), is an express authority in support of the objection; the *Queen v. Parker* (3 Q. B. 291) is to the same effect; also *Douglass v. McQueen* (13 Q. B. 80).

In both cases we are of opinion that the judgment must be arrested.

CURTIS AND WIFE V. JARVIS.

Ejectment—14 & 15 Vic. ch. 184—Mesne profits.

A plaintiff in ejectment claiming substantial damages must give notice as the act directs, and proceed for such damages at the trial of the ejectment, otherwise he waives his claim, and can maintain no action afterwards.

The court refused to disturb a verdict for the defendant, though the plaintiff was strictly entitled to nominal damages.

Trespass for entering and expelling the plaintiff from the possession of certain land, with another count for destroying grass and crops, &c. . In both the trespass was laid on the 1st of April, 1851.

Pleas—1. Setting forth that since the new ejectment act these plaintiffs brought an action of ejectment against this defendant for the same premises, which was tried on the 6th of May, 1852, the defendant having appeared; and that the jury being sworn to assess the damages, as the act directs, by reason of the trespass alleged in that action, assessed them at one shilling; and that on the 28th of June, 1852, judgment was thereupon entered: that in that action no notice was served, under the statute, of an intention to claim substantial damages; and that the damages claimed in this action are the same damages which the jury, in that action of ejectment, were sworn to assess—Second plea—to the same effect, in a shorter form.

The plaintiff replied to the 1st plea, that the trespasses and causes of action in the first action mentioned in the plea, were not the same trespasses and causes of action as those for which this action is brought.

2ndly. The same answer to the second plea.

In opening the case the plaintiffs' counsel stated that he was going for damages sustained by the defendant's wrongful occupation previous to the judgment in the ejectment, as the plaintiff had in that action served no notice of intention under the statute to claim substantial damages.

The learned judge held that by giving no such notice the plaintiff must be considered to have waived any claim to damages by reason of that occupation, and rejected evidence of such damage.

Then the plaintiff's counsel proceeded to make out a claim to damages by reason of occupation and the trespasses

committed on the premises by the defendant after the trial of the ejectment or rather after bringing of that action; and he proved that after the trial of the ejectment the defendant turned many cattle and sheep into the plaintiff's meadows, which remained there several weeks; and the defendant continued in possession for two months after the trial; and that in consequence of the damage done by him during the time to the meadow the plaintiffs had a much less abundant crop of hay than they had the year before.

The defendant gave evidence in his own behalf at the trial, and swore that he continued in possession from the 2nd of April, 1852, (the time the ejectment was brought), to the 19th of May: that in that time he ploughed and sowed three acres of oats, and seeded some nine acres with clover and timothy, and ploughed twelve acres for spring crops, and three for summer fallow; that the season which followed was a bad season for hay: that the spring was late and that the injury done to the meadow by the cattle was consequently but little. Another witness swore that the crop of hay in the meadow was a good crop for the season.

The learned judge told the jury that the plaintiffs were entitled in this action to a verdict for any damage which they should find the plaintiffs had really sustained and for which they could not have recovered on the trial of the ejectment on account of their having accrued subsequently to the bringing of that action; and that at any rate he thought the plaintiffs were strictly entitled to nominal damages by reason of the subsequent occupation. The jury, however, found for the defendant, considering, probably that the plaintiffs were benefited by what the defendant had done on the farm since the 2nd of April, 1852, rather than injured and that it was vexatious to bring this action after the plaintiffs had got possession under their judgment.

Read, (with whom was *J. Duggan*) shewed cause against a rule nisi for a new trial. They cited *Bagot v. Williams*, 3 B. & C. 235.

D. G. Miller contra.

ROBINSON, C. J., delivered the judgment of the court.

It is clear from the manner in which the plaintiffs' counsel

opened his case at the trial that he brought his action in order to recover substantial damages for the occupation which preceded the bringing of the ejectment. He could not be allowed to recover in this subsequent action for any such damages. The defendant had appeared in the ejectment: the plaintiff was therefore in a situation to claim in that action whatever he thought he was entitled to up to that time, provided he had given notice, as required by the statute 14 & 15 Vic. ch. 114, that he intended to claim substantial damages. If he omitted to give such notice, he waived any such claim and could bring no action afterwards on that account. This being so it was natural that the jury upon the trial should not be inclined to support the action upon a different ground from that on which the plaintiff had brought it. The direction given by the learned judge was not one of which the plaintiffs could complain, for he told the jury that on the issues the plaintiffs were entitled to a verdict for nominal damages at least; and as to any further damage, that would depend upon their opinion after the evidence they had heard as to whether the plaintiffs had in truth sustained damage, from the occupation proved, with all the attendant circumstances. If the jury had found nominal damages for the plaintiffs we should not have interfered, and it would be contrary to the principles on which new trials are granted, if, in the absence of any misdirection, we should grant a new trial in order to compel the jury to find a nominal verdict, where in the opinion of the jury no real injury had been sustained. That the jury may take into their consideration improvements made, and allow them to go in mitigation of damages, even to the extent of reducing the verdict to one merely nominal, is clear.

Rule discharged.

THE TRUSTEES OF THE ROMAN CATHOLIC SCHOOL OF BELLEVILLE V. THE SCHOOL TRUSTEES OF THE TOWN OF BELLEVILLE.

Common School Act, 13 & 14 Vic. chap. 48—Separate Schools, in what fund entitled to share

The court refused to interfere by mandamus on the application of the Trustees of the Roman Catholic School of Belleville, to compel the School Trustees of the town to pay over to them a certain sum claimed as their share of the common school fund.

1st. Because it could not be said to be clear and without question what sum the applicants were entitled to, or in what fund they had a right to share under the provisions of the act.

2nd. Because the applicants, before coming to this court, should at least have been able to shew that they had submitted their complaint to the Local or Chief Superintendent, and that he had refused to entertain it; and *quære* whether the decision of the Chief Superintendent upon such a complaint would not be final.

3rd. Because the application should not have been made on behalf of the trustees, but on that of the teacher of the separate school, as being the person entitled to the money.

Semble: That what a separate school established under the 19th section of the act is entitled to share in, is the sum apportioned by the Chief Superintendent out of the government grant, and the sum, at least equal in amount, raised by local assessment for the payment of teachers.

Richards, in last term, obtained a rule on the Board of School Trustees of Belleville, to shew cause why a mandamus should not issue, commanding them to pay to the Trustees of the separate Roman Catholic School of the town of Belleville, or to give an order to the trustees of the Separate Roman Catholic School upon the treasurer of the town, for the sum of 50*l.* towards payment of the salary of the teacher of the said separate Roman Catholic School for the present year; or the sum of 46*l.* 11*s.* 9*d.* being the share to which the said separate school was entitled of the sum of 200*l.* of the common school fund of the town, paid to the other teachers of common schools, for their first half year's salaries for the present year; or the sum of 40*l.* being the share of the said 200*l.* to which the said school was entitled, or such other sum as this court may think said separate school entitled to.

This rule was served on the secretary and chairman of the Board of School Trustees.

Before moving for the rule the Trustees of the Roman Catholic School had served a written demand upon the general Board of School Trustees for Belleville, requiring the Board to pay them for their teacher a proportion of the

200*l.* school money paid by them to the four teachers employed by them for the first six months of the year (1852), according to the average attendance of scholars at their said separate school, taught by one Mason, for the said six months, as compared with the average attendance at all the other schools during the said period, specifying the averages of the several schools, and shewing thereby a claim for Mason's school to the sum of 60*l.* 14*s.* 8*d.*; or to apportion the 200*l.* among the four common schools and the separate school teacher, in proportion to the average attendance of scholars, in which case 46*l.* 11*s.* 9*d.* would be the sum to which such separate school was entitled.

It was shewn that the Board of School Trustees for Belleville estimated for 672*l.* 14*s.* 10½*d.* "for the part of the year 1852 unprovided for," and called upon the Town Council to raise that sum by assessment; "for common school purposes for 1852," which sum was by the Council directed to be raised.

This sum was—for four teachers 300*l.*; improvements to school houses 140*l.*; ditto for ventilation 75*l.*; with other items for rent of school houses, maps, and apparatus, and other contingencies.

And this sum was in addition to 189*l.* 7*s.* 10½*d.*, estimated for at another time in the same year for similar purposes; the two sums amounting to 861*l.* 2*s.* 9*d.*

It was sworn in answer to this application "that for the year 1852, there was apportioned by the chief superintendent of schools to the town of Belleville 90*l.* 8*s.* 6*d.*, and the like sum raised by local assessment for the purposes mentioned in the 40th section of statute 13th and 14th Vic. ch. 48; that on the 9th of November, 1852, the treasurer paid to one of the trustees of the separate Roman Catholic School, upon the order of the Board of Trustees, 21*l.* 13*s.* 4*d.* as and for an apportionment and proportion of the school fund of 1852, due to the teacher of the separate Roman Catholic School, for his services during the first half of that year, and that the said trustees accepted the same; that according to the statement made by the trustees of the Roman Catholic School, in their demand served upon the School Trustees of

Belleville, the average number of scholars attending the common schools for the year was 326, and those attending the separate Roman Catholic school 99; in all 425: that during and for the year 1852 there was apportioned by the chief superintendent of schools to the town of Belleville £90 8s. 6d. which, with an equal sum raised by assessment makes £180 17s. 0d. which sum the school trustees, considered to be, and are advised by the chief superintendent that it constitutes the school fund of the town, out of which the teachers of the separate school should be paid in proportion to the average number of his scholars, and the average number of the scholars of the common schools on the 1st of July, 1852; that such proportion was estimated by the school trustees to be for the half year £21 1s. 3d., which sum they paid to the Roman Catholic school trustees and rather over, viz., £21 3s. 4d.

Vankoughnet, Q. C. shewed cause.

The clauses of the statute bearing upon the question, and referred to in the argument, are noticed in the judgment.

ROBINSON, C. J.—The learned counsel employed in this case have been very industrious in dissecting and comparing the various provisions of the Common School Act, and, have argued on both sides very ably; but I think without much confidence that the court would be able to bring themselves to any perfectly clear and satisfactory conclusion upon the question of what should be taken to constitute the fund in which each separate Protestant, or Roman Catholic, or colored school is to share under the 19th clause of the statute 13 & 14 Vic. chap. 48.

We must remember that this is an application for a mandamus to compel the School Trustees of Belleville to make payment to the teachers of the separate Roman Catholic School of something which, according to some of the alternatives in the rule, would be in addition to the sum which the average attendance of pupils in the school would shew them to be entitled to under the 19th section of the act, as the due share of such school out of the school fund, unless we take the words "school fund" used in the 19th clause to comprehend something more than in the

40th clause is described as constituting the common school fund of the town; that is to say, "the sum of money apportioned annually by the chief superintendent of schools to each county, township, city, town, or village, and at least an equal sum raised annually by local assessment, for no other purpose than that of paying the salaries of qualified teachers of common schools."

If we should issue a writ, as prayed, commanding the desired payment to be made, it could only be because we see it to be beyond question that it is the public duty of the school trustees to do what has been demanded of them, and what they have refused to do. If the least doubt remained on our minds as to the proper construction of the statute in this respect, it would be wrong to grant the writ, because when granted it must be obeyed; and we must take care not to place any one in peril of a contempt for refusing to violate an act of parliament.

I think, in order to form an opinion upon the question it is material to consider the following sections of the act: 12th, 9th sub-section, and the second head of the 19th sub-section of the same clause; also, the 18th, 19th; 24th, sub-section 6; 27th; 35th, sub-section 5; and 40th and 45th; and I have some doubt whether the 35th section, part 5, does not make the chief superintendent the proper tribunal for determining all claims upon any part of the school fund: unless what the present applicants desire to share in forms part of the "school fund," it is quite clear they can have no right under the 19th clause of the statute to share in it. If it does form part of the "school fund," then the 35th clause provides that the chief superintendent is to decide "upon all matters and complaints submitted to him, which involve the expenditure of any part of the school fund;" and the applicants, before they come to this court with any complaint, should at least be able to shew that they have submitted their complaint to him, and that he has refused to entertain it, for a mandamus is the proper remedy in those cases only "in which a party hath a clear right to have a thing done, and hath no other specific means of compelling its performance"—(8 East. 219).

It does indeed appear by the papers before us, that the chief superintendent has been referred to by the general board of trustees on the subject, and that his opinion has been obtained; but it is the parties complaining who should first submit their complaint to him in a formal manner, and ask for redress. Whether his judgment, given upon such a complaint, would not be final, is not a question at present before us.

We must assume that all parties desire only what is right, though they may differ in their opinion upon the effect of the statute. I own, for my own part, that I find it no easy matter to satisfy myself as to what the legislature really did mean in regard to the point which has been discussed before us; and the difficulty, I dare say, has been occasioned, as was intimated in the argument, by the 19th clause having been inserted in the act during its passage through the legislature, by some gentlemen who did not, and could not, perhaps, under the circumstances, take the time and pains necessary for adapting the other provisions of the act to its reception.

Under the doubt which at present surrounds the question, and considering also the provisions which refers all parties in the first place to the chief superintendent with their complaints, I do not think we can grant a mandamus; but if it can be of any use to state the impression which rests upon my own mind after a consideration of the statute, I have no objection to say that I think, as the act now stands, what a separate school established under the 19th clause is entitled to share in is the sum apportioned by the chief superintendent out of the government grant, and the sum—which cannot be less, but may be more—which has been raised by local assessment to meet that grant; raised, I mean, *for payment of teachers generally*, and not upon an estimate for a specific purpose.

I cannot make out quite clearly, without seeing more than is in the papers before us, whether the school trustees did or did not estimate for more than a sum equal to the government allowance, to form a fund for paying their common school teachers generally; if they did, then it.

seems to me the Roman Catholic trustees had a claim to share in the whole of such sum, added to the government allowance, according to the average attendance of pupils at their school.

For the reasons I have given I think the rule for a mandamus should be discharged, but not with costs.

BURNS, J.—In my opinion the application on the part of the trustees must fail, because they are not the parties who by law have a right to the money appropriated to, or that should be appropriated to the separate school. The application is made as if the school trustees were the parties to receive the money, and deal with the teacher they were to employ. I do not think such is the construction of the act. The 19th section, in providing for separate schools, says, "That each such separate schools shall go into operation at the same time with alterations in school sections, and shall be under the same regulations in respect to the persons for whom such school is permitted to be established as are common schools generally." The trustees would seem to understand the provisions of the legislature in the light of applying to their school, because the teacher they employ has qualified himself to teach by an examination, and by having obtained the necessary certificate. In this respect they are, I think, quite right; but at the same time their school was subject to the regulations which the act provided for as to others. Under the 8th clause of the 24th section, the duty of the board of trustees is to give the teacher orders upon the treasurer for the sum or sums of money which shall be due him. In the case of schools in townships, the trustees of the school section divisions give the order to the teacher upon the local superintendent—(see clause 6, of section 12); and the local superintendent again gives orders to the teacher upon the treasurer—(see clause 2, of section 31.) Whichever way the school trustees are constituted, whether in a united board or in school section divisions, the money due to the teacher does not pass through the hands of the trustees, and there is no difference in this respect between the separate schools and the common schools generally.

We could not therefore direct the money to be paid to the trustees of the separate school, for the teacher is the person entitled to it, and it is he to whom any order must be made.

I quite agree with his Lordship the Chief Justice also in thinking that, supposing the application could be entertained on behalf of the trustees of the separate school, yet before it could be granted it must be shewn to us that every other remedy has been tried and has failed. It is the duty of the municipality to appoint annually a local superintendent. This officer is quite independent of the board of school trustees or the trustees of school section divisions, being elected or chosen by another body than that which elects the trustees. By the 7th clause of section 31, a portion of the duties of this officer is "to decide upon any other questions of difference which may arise between interested parties under the operation of this or any preceding act, and which may be submitted to him; provided always, that he may, if he shall deem it advisable, refer any such question to the chief superintendent of schools; provided also, that any aggrieved or dissatisfied party, in any case not otherwise provided for by this act, shall have the right of appeal to the chief superintendent of schools." Then, again, in enumerating what the duties of the chief superintendent shall be, it is by clause 5 of section 35 enacted that he shall "see that all moneys apportioned by him be applied to the objects for which they are granted; and for that purpose to decide upon all matters and complaints submitted to him (and not otherwise provided for by this act) which involve the expenditure of any part of the school fund." I do not define how, or in what way the application should be, whether to the local superintendent in the first instance, and then by way of appeal to the chief superintendent, or whether it may be made in the first instance to the chief superintendent; but I have quoted the duties of both officers to shew that the legislature has provided a domestic forum for questions to be determined. Is the present case then a point which might be brought before the chief superintendent? It may be said

that it is purely a legal question, and that the legislature did not mean such to be determined by an officer who perhaps might not be versed in legal distinctions. That argument is however answered by the fact, that in the 18th clause of section 12, and in section 17, the legislature has provided for certain differences and disputes, and of a character, too, which may involve legal considerations, to be disposed of and determined by arbitration. The question then is, whether the present case comes within the terms of clause 5 of section 35, and I think it does. In such a case as the present it would be quite competent for the trustees to complain to the superintendent that their teacher was paid differently from the fund than the other teachers, and so they could obtain his decision. That decision might be against a party who, notwithstanding, had a legal right, but then it would not be final, or the board of trustees might think it wrong, and thus by resisting take the opinion of a court of law as to the construction of the act. There may, however, be no necessity to go to a court to obtain an opinion, because the decision of the superintendent may be acquiesced in by all parties. It appears to me, looking at the whole scope of the act, that it was supposed the affairs of the schools might be managed by means of arbitrations and references to the local superintendent and the chief superintendent, without troubling the courts.

As it has been desired by both parties, I have no objections to express an opinion upon the point in issue between them, as to what constitutes the school fund. The school fund is, I think, not only the sum granted by the legislature, and the equivalent sum raised by the municipality, but also whatever beyond the equivalent sum the municipality shall think proper to raise for the purpose of paying teachers. The whole money so raised, together with the sum apportioned from the government grant, forms the school fund.

DRAPER, J., concurred.

Rule discharged..

ROLKER ET AL. V. FULLER.

Crown Office—Practice.

The court refused a rule to set aside a *fi. fa.* because issued by the officer at his own house before office hours.

On the 11th of February, 1853, a clerk of the attorneys for the plaintiffs in this suit (Messrs. Crawford and Hagarty) went to the crown office between the hours of nine and ten, a. m., the hour for opening the office being ten o'clock, and finding no clerk there, went to the private residence of Mr. Pearson, a clerk who issues writs in the crown office for Mr. Small, the clerk of this court, and obtained from him a writ of *fieri facias* upon a judgment in this case which had been entered before that day. He took that writ immediately to the sheriff, and placed it in his hands ten minutes before ten o'clock. At the opening of the office, at ten in the same morning the clerk of the plaintiffs' attorney, in another suit against this defendant, was in attendance, and entered judgment, and took out a writ of *fi. fa.*, which he delivered to the sheriff a few minutes after ten a. m., on the same day.

Cameron, Q. C., for the plaintiffs in the latter suit, moved to set aside the *fi. fa.* obtained in the former, as having been irregularly and illegally issued.

ROBINSON, C. J., delivered the judgment of the court.

We find no authority, and none was cited, for holding that this writ should be set aside as having been issued illegally. It is not objected that it was not sealed and issued by the proper officer, but only that the officer issued it an earlier hour than is appointed for the opening of the office. We take it that the appointing office hours during which the office must be kept open for the despatch of business is a regulation for the convenience of suitors, that they may know when they will certainly find the office open. But we have found it nowhere held that an officer of the court is not competent to act before or after office hours, as he has been always held competent to act on those holidays when he is not bound to attend in his office at all.

The cases in which the courts have been called upon to

check the unseemly practice of officers exacting exorbitant fees for issuing writs on such days as I have referred to—*Figgins v. Willie* (2 Bl. Rep. 1186), *Sparrow v. Cooper* (Ib. 1314), *Pater v. Croome* (7 T. R. 336) *Martin v. Bold* (7 Taunt. 182), seem to furnish clear ground for assuming that it was allowed to be in the discretion of the officer to act or not at such times, though the court discountenanced the exaction of excessive fees when the office was closed.

It might lead sometimes to very unfortunate consequences if process could not be obtained out of the regular office hours. In the present case, that party who obtained the execution in the manner complained of, had entered his judgment in the ordinary course, and he obtained no undue advantage when he got his execution before a party whose judgment was not yet entered. It may be that if that officer who issues writs were to accede readily to such a request as was made in this case, it would lead, in the struggle for priority, to a practice that the profession would find very inconvenient; but a check is not unlikely to be imposed, from the inconvenience which it would occasion to the officer himself. We think we must refuse the rule in this case.

Rule refused.

DANIELS V. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF
BURFORD.

Illegal resolution acted upon, and therefore not rescinded.

The court refused an order to rescind a resolution of a municipal council, authorizing the reeve of the township to draw a draft on the treasurer in favor of certain members of the council for their services as such up to the 13th of August, 1851,—because such resolution was spent and inoperative; and therefore although illegal, no object could be gained or redress afforded by setting it aside.

D. G. Miller obtained a rule nisi to shew cause why a resolution of the Council passed on the 13th of August, 1851, authorizing the reeve of the township to draw a draft on the treasurer in favor of each of the members of the Council, for their respective services as such, should not be rescinded; and why the said Council should not pay the costs of this application.

This was moved on an affidavit made on the 7th of June, 1852, of one Lawrence Daniels, a justice of the peace, and a freeholder and householder residing in the township of Burford, who swore that the paper annexed to his affidavit was a true copy of the resolution, and was received by him from the clerk of the municipality of Burford, who refused to affix the corporate seal to it, because he said that would make it a by-law.

He swore that he believed that under this and similar resolutions the municipality had from time to time taken remuneration for their services as councillors contrary to law; and that they had done this under resolutions rather than pass by-laws for the purpose, in order to avoid being compelled to refund; that the present members (1852) of the municipality had, under colour of the said resolutions, received considerable sums of moneys belonging to the said township for their services as councillors, which the deponent desired should be refunded to the treasury for lawful purposes.

The order ran thus—"Moved by Mr. Muir, and seconded by Mr. Perley, and resolved—that the Reeve be authorized to draw a draft on the treasurer of this township in favour of each of the members of this corporation, for their respective services for the council from January 1st, 1851, to the 13th day of August, inclusive, of the same year, at the rate of five shillings per day, as follows: R. Rounds, 14 days, C. S. Perley, 14 days, R. Muir, 14 days, J. B. Henry, 13 days, Charles Hedges, 10 days—Carried."

At the foot was a certificate of George Green Ward, Township Clerk of Burford, dated 7th of June, 1852, that this was a true copy of a resolution passed by the Municipality of the Township of Burford on that day.

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The resolution moved against only authorized one payment to be made; that is of wages to each member of the Council on and up to August, 1851. If there has been any payment of a similar kind made since, it could not have been made under this resolution, for it authorizes no payment to be made for any period beyond August, 1851.

Whether wages up to that time were paid as that resolution or order directs, is not distinctly stated, but we assume that they were; still it is clear that the order is not a continuing authority in its terms, and if spent and inoperative, there is no object in setting it aside, if we had clearly the power to interfere.

It was undoubtedly a violation of the law, for which any party entitled to complain may take such remedy against the treasurer or otherwise as he may be advised. The setting aside of the resolution, which on the face of it is illegal, and a mere nullity, is not necessary in order to clear the way for any remedy, for it can sanction nothing that has been done under it. It would be idle in this court to entertain motions made at any distance of time to rescind orders of corporations, which, however illegal, can no longer affect any one.

We take it for granted that this application is made to us not under the idea that we can interfere in such a case under that clause of the 12 Vic. ch. 81 which authorizes us to quash *by-laws* which we shall find to be illegal; but that we are called upon to exercise the common law jurisdiction of this court, which enables us to keep corporations of this description, instituted for the purposes of government, within the bounds of their charter. It is not because we are satisfied that we have no such jurisdiction that we decline to interfere, nor because we consider that the corporation in question had any right to make such an appropriation of this public money; but because no redress would be afforded, nor any object gained, by doing what we are asked to do, and because, if we made this rule absolute we might on the same principle be called upon to rake into the proceedings of every municipal corporation from the beginning, in order to pronounce upon the abstract question whether any such proceeding was legal, though no practical result could follow from our decision.

The Council ought to have been aware that if it were legal to remunerate their members at all (which in other similar cases (a) we have held it could not be) they could only do that properly by a by-law. Then, adopting the

(a) See *Wright v. Municipal Council of Cornwall*, 9 U. C. R. 442.

irregular proceeding of a resolution, or order, exposes them to the suspicion of desiring to evade the provision of the Municipal Act which subjects illegal by-laws to be quashed. It ought at once to have occurred to them that it could not be right for them to do that informally which they had no power to do directly and formally. And it would be well for all who take part in the illegal appropriation of public moneys by a similar proceeding (as well the Councilors who make the order as the treasurer who obeys it) to reflect that there is a civil or criminal remedy in such cases, if not both. The treasurer should not pay money upon an illegal order, for an act of Parliament should be regarded by him as a higher authority than the resolution or by-law of a corporation created by Parliament.

I refer to the cases of *Stable v. Dixon* (6 East 169), and of *Rex v. Williams* (3 B. & A. Al. 215), as bearing by analogy, upon this case. For the reasons which I have given we discharge this rule, making no order as to costs.

Rule discharged.

MCMURRICH V. POWERS.

Promissory note—Notice of non-payment.

A. proposed to give his note indorsed by defendant, in payment for goods, stating that the defendant lived at Lindsay. He subsequently made the note payable to defendant, procured his indorsement, and transmitted it to his creditor at Toronto.

Held, that the maker must be considered as the agent of the indorser; that his statement of the indorser's place of residence rendered further inquiry unnecessary, and therefore that a notice of non-payment duly mailed to Lindsay, was sufficient.

Held, also, that the above facts supported an allegation of due notice.

ASSUMPSIT on two promissory notes, made by one John Powers, payable to the defendant, or order, and by him indorsed to the plaintiff. The pleas denied the indorsement, and that the defendant had due notice of non-payment. At the trial, before Draper, J., at Cobourg, the only question that was made was respecting the notice. A witness was called who swore that the defendant's brother John, lived at Lindsay, in the county of Peterborough, and was a merchant there; that the witness had sold him goods, and that John Powers proposed to give indorsed notes in payment—notes to be indorsed by his brother; that the witness asked John Powers where his brother

lived, and he replied that his brother lived in Lindsay, and was a farmer. The witness agreed, and John Powers sent him the notes now sued on. After the notes fell due, the witness wrote to both brothers, threatening to sue them, and addressed them both at Lindsay; John Powers came up, and an arrangement was made by which these notes were transferred to the plaintiff. When each note fell due, a proper notice addressed to the defendant at Lindsay, was duly mailed. It was proved that the defendant's residence during all the time was in the township of Cavan, in which there was a post office nearer defendant's residence than Lindsay, which is in the township of Ops, and twenty-six miles from defendant.

The sufficiency of this evidence of notice was objected to, and the objection was overruled; leave, however, being reserved to defendant to move to enter a nonsuit. The case of *Vaughan v. Ross* (8 U. C. R. 506), was cited.

In Michaelmas Term, *Vankoughnet*, Q. C., obtained a rule nisi to enter a nonsuit on the leave reserved.

In this term, *Cameron*, Q. C., shewed cause.

DRAPER, J., delivered the judgment of the court.

There is not much difference in the facts between this case and that of *Vaughan v. Ross*, cited in the argument. There the note, having been indorsed by the payee for the accommodation and benefit of the maker, was handed by the maker's agent to the party for whom it was intended by the maker. The party acting as agent for the maker was considered to be acting as agent for the indorser also, and that it was sufficient to send notice of non-payment addressed to the indorser, at the place which such agent had, on enquiry, at the time of handing over the note, declared to be the indorser's residence. Here the maker of the note, in contemplation of making it in favour of the defendant, who was to indorse it, that it might then be delivered to the maker's creditor, is asked the residence of the proposed indorser, and states it to be Lindsay. He subsequently makes the note, procures the indorsement, and transmits it to his creditor at Toronto, to whom he stated that the indorser lived at Lindsay. When the defendant indorsed this note, and gave it to the maker, for the maker's

use and accommodation, he certainly must be held to have constituted him his agent for the purpose of consummating the indorsement by delivery; and the delivery so made, must, I think, be held to involve a continuous representation of the place of the indorser's residence, so as to render further enquiry on the creditor's part unnecessary. If so, the principle of *Vaughan v. Ross* strictly applies, and this rule should be discharged.

I assume the endorsement by defendant as conclusively established. It was disputed at the trial, but that line of defence was abandoned, and has not been renewed on the argument. But it was argued that on the issue respecting notice, it was incumbent on the plaintiff to prove notice, whereas in fact he relied on shewing an excuse for not giving notice, and *Allen v. Edmundson* (2 Ex. 719), with the cases therein commented on, was relied upon. That case decides that going during business hours to the counting house of the drawer of an overdue bill of exchange, for the purpose of giving notice of dishonour, and knocking at the door, which was shut, and no one answering, and then coming away without leaving any notice, will not sustain an allegation of due notice. But Parke, B., says "If the plaintiff had sent a written notice by post, or had left it by putting it through the door, that would have been an intimation of dishonour in proper course to be received by the party." Here the notice was sent by post; the only question is, as to the propriety of the address, which, falling within the decision of *Vaughan v. Ross*, is sufficient.

The rule must therefore be discharged.

SUMNER V. KIRKPATRICK AND CAMPBELL.

Money paid to defendant's use—When maintainable.

- A *ca. sa.* against the defendants in this suit was given to the deputy-sheriff, and a warrant made to the plaintiff, a bailiff to execute it; he arrested both defendants, and one escaped on his way to the gaol.—The sheriff sued his deputy, who recovered over against the bailiff, and the bailiff then sued both defendants as for money paid to their use.
- A nonsuit was directed on the ground that the payment by the sheriff satisfied the plaintiff in the original suit, and therefore this plaintiff could not recover as for money paid to the use of the defendants, because their debt was satisfied before.

Held, that the nonsuit on this ground was wrong. *Quere*, however, whether under the facts proved, an assent to the payment could be implied on the part of *both* defendants, so as to sustain this action.

ASSUMPSIT for money paid to the defendants' use, tried at London, before McLean, J.

In this case a writ of *ca. sa.* against the defendants in this action, at the suit of a third party, was put into the hands of the deputy-sheriff, and a warrant was made to the plaintiff, a bailiff, to execute it. He arrested both the defendants, and Campbell made his escape on the way to the gaol. The sheriff, in consequence, sued Burnett, his deputy, for indemnity; and Burnett recovered over against this plaintiff, whom he had employed as his bailiff on the occasion. The plaintiff, having paid the amount, brought his action against both the defendants on the common count, as for money paid to their use—the effect of the payment by the sheriff being to discharge the debt due by both the defendants on the execution, which payment was a disbursement that fell eventually on the plaintiff.

The learned judge did not consider that the action could be sustained, in the absence of any proof of an express promise by the defendants to repay the money, and he directed a nonsuit.

Hagarty, Q. C., moved to set aside the nonsuit. He cited *White v. Leroux*, M. & M. 347; *Griffin v. Roberts*, 1 Esp. 383; *Stephen's* N. P. 323; *Story on Agency*, notes to sec. 308; *Spencer v. Parry*, 3 A. & E. 331, 8 C. B. 541.

Becher (with whom was *Cooper* for defendant Campbell) shewed cause, and cited *Pitcher v. Bailey*, 8 East 171.

ROBINSON, C. J., delivered the judgment of the court.

The learned judge, it appears, nonsuited the plaintiff, upon the ground that when the sheriff paid the debt as being chargeable for the escape, the plaintiff was satisfied, and that the plaintiff in this action could not therefore recover against these defendants on the ground that he paid the money for their use, because their debt was discharged before. But we do not think that any impediment lay in the way of the plaintiff's recovery upon that ground. It is true that the sheriff, as being the person immediately liable, paid the debt in the first instance, but that, we think, should be regarded as a payment made provisionally—as where an agent advances money to meet a charge upon his principal,

who afterwards repays him, the principal is to be afterwards treated as having made the payment to the third party, as indeed he might before the repayment, if he chooses to sanction the disbursement. Here the payment eventually fell upon the officer from whom Campbell the debtor escaped as he had to indemnify the deputy-sheriff from whom the sheriff recovered the money which he had himself been compelled to pay. We are of opinion, therefore, that the nonsuit should be set aside without costs.

Upon the action generally, my present opinion is, that as the escape of Campbell was, for all that appears, a negligent escape merely, there being nothing in evidence to shew it voluntary, and wilful misconduct in the sheriff will not be presumed: it follows as a consequence that the officer has a good right of action against Campbell to recover the amount which he has been made to pay in consequence, and might even have sustained an action on the case against Campbell before he had himself paid anything. The only difficulty, we think, is upon the point on which the rule was chiefly argued—namely, whether this action lies under the circumstances against both the defendants—no promise by either to repay the sheriff or his officer having been proved, and Kirkpatrick not being shewn to have had any concern in Campbell's escape. No doubt it is not necessary to shew a request in all cases where money is paid for another's use, for the law will, in many cases, employ both the request, or rather the assent to the payment, and the promise to repay. Whether upon the facts of this case and assent by both the defendants to the payment would be implied, is a question on which our minds are not yet made up. The general principle is stated to be "that the defendants assent is implied in all cases where the plaintiff is compelled to pay the debt of another through his default." (a) I do not yet see that upon the evidence that principle can be applied in the present case. But the nonsuit having been ordered upon the other ground, which, with much deference to the learned judge,

(a) Stark, Ev. 3rd Ed. II. 75.

we think was an error, it is possible that all the facts which might have a bearing upon this question were not elicited. It might, perhaps, be of consequence to know what was the nature of the cause of action in the original suit against these defendants—whether they were recovered against as partners, or as otherwise liable upon a joint undertaking express or implied, or as persons liable in different capacities upon a note or bill, and sued in one action under our statute. I do not say that a knowledge of the fact in this respect would be found to influence our decision, but it might appear material upon a full examination of the question. No doubt Kirkpatrick is discharged from the execution by the payment, but I am not sure that that alone should be decisive of the question, if the fact be that the officer has not been compelled to pay the money by any default of his, and, especially, if these two defendants are not found to have been bound in one common obligation. The case cited, of *Capp v. Topham* (6 East 392), is not applicable to the circumstances of the present case.

Rule absolute.

STUART V. SPENCE.

10 & 11 Vic. ch. 5—Prescription—Life estate—Pleading.

In case for overflowing the plaintiff's land, the defendant pleaded the enjoyment of a right for twenty years—The replication simply traversed the enjoyment.

Held, that the plaintiff could not give in evidence a life estate outstanding, as tenant by the courtesy, but must, by sec. 5, of 10 & 11 Vic. ch. 5, reply that fact specially.

Case for overflowing the plaintiff's land. In the two first counts of the declaration the plaintiff alleged his possession of the close in the usual form, and stated the injury in each count in a manner somewhat varying from the other. In a third count the plaintiff claimed damages for injury to his reversionary interest, alleging the land to be in the possession of his tenants. The defendant pleaded—1st "not guilty," 2nd "plaintiff not possessed," &c., and, third and fourth, right by prescription to raise the water and overflow the plaintiff's land. The plaintiff answered the pleas of prescription by traversing the enjoyment for twenty years, and new assigning for excess.

At the trial at Brockville before Robinson, C. J., it appeared from the evidence given that a dam which the defendant had erected upon his own land, situate on the "Nation" river had the effect of throwing back the water upon the land in question, which is higher up the stream. The plaintiff sued as tenant by the courtesy, for injury done to his life estate.

He shewed that in 1819 he acquired a right by marriage, in behalf of his wife, who succeeded to the estate as heiress to a collateral relation ; and that having issue by his wife capable of inheriting, he was tenant by the courtesy at the time of the injury complained of. His wife, Lady Stuart, died in 1849.

The defendant built his dam in 1811, and had always since continued to keep it up, but according to the evidence given on the part of the plaintiff, he raised it three or four years ago about six inches. And it was proved that the dam being complained of in 1845, by a neighbour whose land was above him on the river, and nearer than the land now in question, an arbitration took place between him and that neighbour, and the defendant then agreed to keep the dam at the height only of seven feet three inches ; but about four years afterwards he raised to seven feet nine inches. There was no proof given at the trial of any tenancy under the plaintiff, as set fourth in the third count.

The defendant gave evidence which contradicted that on the plaintiff's side, in regard to the fact of the dam having been raised of late years.

At the conclusion of the case the learned Chief Justice told the jury that, in the first place, to support the defendant's pleas of prescriptive right under our statute of 10 & 11 Vic. ch. 5, it was necessary that an enjoyment should be shewn as of right, not by permission, to the full extent of the injury complained of, and for twenty years extending up to the time of this action being brought, for that was what the statute required in every such case ; but that there was, besides, this peculiarity in the present case—that during the period of the alleged enjoyment by the defendant of a right in derogation of the right of the owner of

the land above him, this plaintiff was seized not as owner of the fee, but of a life estate as tenant by the courtesy that the right of the reversioner would not be bound by an adverse enjoyment for twenty years under such circumstances; and that it had been held in cases which he could not distinguish from the present, that when the reversioner would not be concluded by the twenty years' enjoyment proved, such enjoyment could not avail as proof of a prescriptive right against any one holding a less estate, for that the prescription must be established absolutely and against all the world, or not at all.

The jury found for the plaintiff, £28 15s.

Richards moved for a new trial on the law and evidence and for misdirection; and on affidavits. He cited *Clayton v. Corby*, Q. B. 813; 2 Saund. 175, *b*.

Vankoughnet, Q. C., shewed cause, and cited *Bright v. Walker*, 2 Cr. M. & R. 211; *Harbidge v. Warwick*, 3 Ex. 552; *Hale v. Oldroyd*, 14 M. & W. 789; *Pye v. Mumford*, 11 Q. B. 666.

ROBINSON, C. J., delivered the judgment of the court.

This case turns upon the proper construction and effect of our Statute 10 & 11 Vic. ch. 5, relating to prescription, which in its provisions very closely follows the English prescription act 2 & 3 Wm. IV. ch. 71. The case of *Bright v. Walker* (2 Cr. M. & R. 211), is an express authority that no right can under the prescription act be established against any person, unless the right can be held binding as against all persons; and here it was shewn clearly that this plaintiff has but a life estate in right of his wife, whose heir cannot be prejudiced by his acquiescence. There is no doubt that the principle established in *Bright v. Walker*, which has been confirmed by several later decisions, applies to this case. The general issue only was pleaded there, and it does not appear to have been doubted that the defence was open to the party without its being specially pleaded. This, however, is the case of prescription set up in a plea by way of answer to the plaintiff's action; and the question is, whether the existence of the life estate is not required to be specially replied by the express words

of the 5th clause of our statute. It would seem clearly to be necessary; and I see no ground for distinguishing this case from *Pye v. Mumford* (11 Q. B. 666), in which it was determined that it must be specially replied, being a matter of fact not inconsistent with the mere fact of enjoyment. It seemed to me at the trial that there might be a difficulty here for want of special replication setting out the life estate; but the case of *Bright v. Walker* was cited as an authority to the contrary, and I had not then seen the case of *Pye v. Mumford*. That the opinion of the jury, however, might be taken upon the question of excess alleged in the new assignment, and upon which issue was joined, I left that point to the jury; and I was under the impression that although they did not by their verdict express that they had found the damage solely upon the evidence of the dam having been raised of late years, according to the testimony of the plaintiff's witness, Lawrence—yet that they did in fact found their verdict on the excess. I am not certain however that it was so. It is strongly urged on the part of the defendant that, as my direction to the jury was against the defendant, exclusive of the question of the dam having been raised, and upon the ground that the defendant could not avail himself of any alleged prescriptive right by reason of the outstanding tenancy for life in the plaintiff, their verdict cannot be properly be looked upon as having been rendered merely for the excess. Undoubtedly, I did at the trial treat the case as being clearly in favour of the plaintiff, independently of the question of excess; and the jury, I dare say, so understood me, and did not express that they had given their verdict only on account of the excess. It may have been, as the defendant's counsel states, that they did not determine the question of fact as regards the alleged excess, but considered the plaintiff as entitled at all events to a verdict.

It will therefore be proper that a new trial should be granted without costs, though there is not much object in pressing it, as the plaintiff will probably be allowed on proper application to reply specially to the pleas of the prescription, relying upon the fact of there being an outstand-

ing estate for life, which it does appear is not admissible under a replication traversing the enjoyment.

Rule absolute.

WHITE V. CLARK.

Notice of action—14 & 15 Vic. ch. 54, effect of.

Quære, whether the 14 & 15 Vic. ch. 54, can be applied against a plaintiff in any case where the officer protected by this act had no such protection before, and where the act was committed by him before the statute was passed.

This question was raised, but not decided, as it appeared that the defence was not admissible—the plea of “not guilty” not being marked “by statute.”

TRESPASS for taking and carrying away a quantity of pine lumber. Pleas—1st. Not guilty. 2nd. The lumber not the property of the plaintiff. 3rd. Leave and license. Issue on all.

At the trial, before McLean, J., at Goderich, it appeared that the defendant was agent of the commissioner of crown lands in the county of Huron; and that in April, 1851, he caused this lumber to be seized as having been made from timber cut without license upon the waste lands of the crown. The evidence seemed to make it clear that the timber had been illegally taken from the crown lands.

A nonsuit was moved for, on the ground that the defendant being a public officer, and acting as such, was entitled to notice of action under the 2nd clause of the statute 14 & 15 Vic. ch. 54; and that under the 8th clause of the act it was necessary that this action should have been brought within six months. The lumber was seized in April, 1851, the statute referred to was passed on the 30th of August, 1851, and the summons in this action was sued out on the 13th of July, 1852. It was contended by the plaintiff's counsel that the statute was not retrospective in its operation, and could not be applied to this case, where the officer, at the time he did the act, was not such an officer as was entitled to any privilege in regard to his defence.

The learned judge ruled in favor of the defendant's objections, but the plaintiff declined accepting a nonsuit, and a verdict was in consequence directed to be given for the defendant.

The plea was not marked on the record “by statute.”

Cameron, Q. C., moved to set aside the verdict as being contrary to law and evidence, and for misdirection—he cited *Moon v. Durden*, 2 Ex. 22.

Richards shewed cause, and cited *Pattison v. Bankes*, Cowp. 540; *Rex v. Marks*, 3 East. 157.

ROBINSON, C. J., delivered the judgment of the court.

We think it must have escaped attention at the trial, as it seems to have done indeed on the argument of this rule also, that the plea of “not guilty” was not marked “by statute” in the margin of the *Nisi Prius* record, as required by our 16th rule of Easter Term, 5 Victoria, and the defendant therefore was not at liberty to shew that he was acting as a public officer in committing the injury complained of. It was therefore improper that the plaintiff’s recovery should be defeated on that ground, as it was at the trial, for want of notice of action, and also because this action was commenced more than six months after the act committed. It would be hard, certainly, if in any case where a party had sustained a substantial injury by the wrongful act of a public officer, he should find himself deprived of a remedy in consequence of not giving notice of action, or of not bringing his action in time, when his case was one in which the defendant was entitled to no such protection by the law as it stood before the passing of the 14 & 15 Vic. ch. 54, and where these requisitions could only be held to apply to this case by giving an *ex post facto* operation to the statute. In the present case, indeed, it seems that the plaintiff would have been in time to give notice and bring his action a month afterwards, if he had proceeded directly after the act passed, but in other cases it might be otherwise, and the effect might be to compel us to hold a plaintiff barred of his remedy because he had not complied with certain forms which he could not know would be required, or had been required, till the time for complying with them had gone by.

We should find ourselves inevitably driven to give the act that construction before we should be justified in doing so. The late case of *Moon v. Durden* (2 Ex. 22), cited by Mr. Cameron for the plaintiff, is very strong on that point,

and there are many cases supporting the same principle. All that I mean to say on that point is, that I am not now prepared to hold that the act can be applied against a plaintiff in any case where the officer, protected by this act had no such protection before, and where the act was committed by him before the statute was passed. There is no clause in this statute, as in 13 & 14 Vic. ch. 61, allowing a time to bring an action before the statute shall apply.

Rule absolute.

FISHER V. THE MUNICIPAL COUNCIL OF VAUGHAN.

By-law for closing highway—Objections to—12 Vic. ch. 81.

Held, that a by-law was sufficiently authenticated for the purpose of a motion against it, by an affidavit of the relator that the copy produced was received by T. from the clerk of the council, and delivered by him to the deponent.

It is not necessary to recite in a by-law all that is requisite to shew the authority of the council, or the regularity of the proceedings. These will be presumed, until the contrary is proved.

It was objected; that a by-law was expressed on the face of it to be passed the "municipality of Vaughan;" there being no such corporate body.

Held, that this was not a valid objection; *semble*, if it were, the applicant recognized the by-law as one passed by the corporation intended, by the fact of his moving against it as a by-law passed by that body. A by-law for shutting up an old road need not describe its course, &c., minutely.

Such a by-law is not bad for directing that the parties applying to have the road closed shall pay the expenses.

Municipal councils have authority to close a road, however long in use. *Held*, that want of the requisite notice was not sufficiently shewn on the affidavits stated below.

Dempsey obtained a rule *nisi* to shew cause why a by-law of the Municipal Council of Vaughan should not be quashed, with costs. The by-law was passed on the 8th of April, 1852, and it enacted that the road surveyed by John S. Dennis, surveyor of highways for the township of Vaughan, through lots 1, 2, 3, 4, and 5, in the third concession of the said township, as appears by this report bearing date the 19th of January, 1852, be, and the same is hereby closed up, through the above named lots, and that the expenses attendant upon the same be paid by the parties signing the requisition."

The exceptions taken were—

1st. That the by-law does not set forth any right, power, or authority in the municipality to pass such a by-law, nor any cause or requirement for passing the same.

2nd. That it professes to be passed by "*The Municipality of Vaughan*," and there is no corporate body having that name.

3rd. That it is uncertain in its effect, because the surveyor's report referred too in it is not annexed to the by-law, nor embodied in it; and it is not stated to be recorded in any book of the corporation, nor to be remaining among their archives.

4th. That it is illegal in directing payment of the expenses to be made by private parties, and is uncertain in not specifying the persons who are to pay.

5th. That the council had no authority to close a public highway which had been in use for more than twenty years.

6th. That notice was not given, as required by stat. 12 Vic. chap. 81, sec. 192.

7th. That the by-law was not made and authenticated in manner prescribed by the 198th clause of the statute.

8th. That the by-law does not direct what is to be done with the land over which the road used to run.

Fisher made affidavit that the road in question was laid out by Gibson, a surveyor in 1829, and had been always since used as such, until April, 1852, after the passing of this by-law, since which time the council had caused it to be actually obstructed; that statute labor had been performed on this road from the time of its being laid out till 1851, and that the stopping up of this road occasioned great inconvenience to him.

He annexed a copy of the surveyor's report, made on the occasion of opening this road in 1829, which described the road minutely by courses and distances; and also a copy of the by-law moved against, stating that it was received by one Jacob Troyer, of, &c., from the clerk of the said municipality, and was delivered by Troyer to him, and that he knew it to be a true copy of the said by-law.

An affidavit was also filed of one Jarrot, who swore "that he had no recollection of having seen any notice of intention to stop up the road posted or put up in the said township, or adjacent to the said road." This was all that was stated on the subject of notice.

The council, in answer to this application, shewed an

application signed by more than twelve freeholders of Vaughan, addressed to the road surveyor, in December, 1851, setting forth that this road leading across lots had been rendered altogether unnecessary as a highway, from the fact of the concession line in front having been lately opened, and a plank road constructed thereon, in lieu of this old road; and requesting the surveyor to examine and report upon the old road to the municipality, with a view to having the same closed.

The surveyor accordingly inspected the road, and reported that it ought to be closed, as there was no longer any necessity for it, and the proprietors in the neighborhood, with one exception, were opposed to its continuance. This report was made on the 19th of January, 1852; and the surveyor annexed a copy of a notice, dated the 22nd of December, 1851, which he said, was put upon the saw-mill of this applicant, (Mr. Fisher,) and also in a conspicuous place in the vicinity of each end of the road. He did not state when these notices were put up. The applicant did not swear that he had not timely notice of the intended proceedings.

Hagarty, Q. C. (with whom was *Gamble*), shewed cause.

The clauses of the statute, and the cases referred to, are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

As to the preliminary objection taken to this application—that the by-law does not come before us properly authenticated—we considered and determined that before granting the rule to shew cause. It appeared to us at first that the proof of the copy being delivered by the clerk of the council, as a true copy was probably defective, as resting upon hear-say, and so not a sufficient compliance with the Stat. 12 Vic., chap. 81, sec. 155; but this is not so, for the relator swears that the copy now before us, was received by Troyer from the clerk, and was delivered by Troyer to him, the deponent; and, moreover, he swears that it is a true copy. The deponent may well swear to this from his personal knowledge, for he may have been present, and have seen the clerk deliver the paper to Troyer, and may immediately thereupon have received the same paper from

Troyer. If this were not a true copy of the by-law, that could easily be shewn on the other side.

As to the objections—1st. That the by-law does not set forth any right or authority that the corporation had to make such a by-law; we have several times held that as a general rule is not necessary (*a*). It has been always so held that in the English courts, though there may be a necessity in some special cases for reciting on the face of the by-law the facts which lead to and warranted its enactment. There are exceptions occasioned by express provisions made by the provincial legislature, where any such apply. Upon general principles, we are bound to recognize judicially what these municipal bodies are competent by law to do; and we hold that they need not recite in their by-law all that is necessary to shew that they have proceeded regularly in passing it. That will be presumed till the contrary is shewn. Mr. Dempsey referred us to a case in the Common Pleas, in which I understood him to say this point had been otherwise ruled.—*In re De la Haye v. Gore* of Toronto, (2 C. P. 317); but that seems to be an error on his part. Such an objection was taken, but that objection was not upheld; the by-law was quashed on other grounds, without anything being said of that particular objection.

The 2nd objection is, that the by-law is expressed on the face of it to be passed by the "Municipality of Vaughan," and that there is in fact no such corporate body, for that the proper name is "The Municipality of the *Township* of Vaughan." The answer given to that objection is, that the applicant recognizes the by-law as one passed by the corporation intended, by the fact of his moving against it as a by-law passed by that body, and producing proof of authentication by their officers. We think there is nothing fatal in this objection. On this objection also the case in this court of *Sams v. The Corporation of Toronto* (9 U. C. R. 181), cited by the learned counsel, does not apply, because there the exception was to the entitling of the rule; here the objection is that the corporation have not, in the by-law passed by them, so fully and accurately designated themselves as to preclude the possibility of mistake. We

(a) See *Grierson v. M. C. of Ontario*, 9 U. C. R. 623.

fear there would be great confusion created if the by-laws of municipal bodies were to be closely scanned with a view to raising such exceptions. We do not know that there is more than one "Municipality of Vaughan;" but we did know, as remarked in the case referred to, that there was more than one municipality of Toronto. However, in this case, as well as in the other that was cited, the by-law was quashed on other grounds.

The third objection, we think not tenable. It is a different thing to pass a law for shutting up a road, or a law directing a new road to be opened. In the latter case there is nothing to make it certain where the new road is to run—its course and width, unless the by-law, either on the face of it, or by reference to some matter on record, makes it certain. But the applicant himself shews us here that this road in question had been used for more than twenty years, and he lays before us a copy of the surveyor's report, made many years ago, upon which the road was authorized, and which describes it minutely by courses and distances. There can never be any doubt as to the operation of the by-law for shutting up this road, for whenever a person shall choose to claim a right to use it as a highway he is subject to be met by this by-law, which declares that that which was formerly a highway across the lots shall be no longer a highway. The public right to pass across the lots by any such road as had been used, is wholly gone.

The 4th objection we must also pronounce untenable. The reasons upon which the court in the case of *Dennis v. Hughes et al.* (8 U. C. R. 452), held a by-law bad which awarded a compensation to the proprietor to be paid by private parties over whom they had no control, have no application to the present case. There the corporation were taking land from a person and professing to give him a compensation for it, which compensation neither he nor they could enforce. Here no private right is interfered with, but a road is merely directed to be closed. This calls for no compensation to any one. The direction that the parties applying to have this road closed shall pay the expenses, which, I suppose, means the expense of the survey, was merely an effort to obtain payment of such expenses in that manner

in relief of the public fund. If the question is illegal and nugatory, the applicants need not obey it; nobody can be injured by it, and it can vitiate nothing; it does not make the by-law void.

There is clearly nothing in the 5th objection—that the council had no right to close a road that had been so long in use; the statute imposes no limitation of that kind upon their authority, and we have no right to do so.

As to the 6th objection—of want of notice, such as the 192nd clause of the Municipal Act requires. No doubt there is the same necessity for notice of an intended proceeding for closing an existing highway as of a proceeding for opening a new one; on that point the statute is clear.

But in support of a by-law passed for any such purpose we must in the first place assume that the council have acted regularly in their preliminary proceedings till the contrary is shewn; otherwise the greatest inconveniences might follow; for it might be very difficult to shew a compliance with a form of this kind after the lapse of some years: and although an application to set aside a by-law under the statute must now be made within a short period, yet we must remember that the validity of by-laws may be called in question in another shape, when parties are called upon to support acts done under them; and it would never do to throw upon those who are to support the by-law the onus of proving, at any distance of time, the regularity of all the steps taken in such case by the council. The applicant here ventures to go no further than file an affidavit of a person who says he has no recollection of having seen any notice of an intention to stop this road, posted up in the township, or adjacent to the road; he does not assert even that he does not believe due notice was given, or that he was in that part of the country, or took any means to ascertain whether notice was put up or not; neither does the applicant himself swear that he had not actual notice of the proceeding in good time to oppose it. In the case of *Lafferty v. The Municipal Council of Wentworth and Halton*, (8 U. C. R. 232,) the court took precisely the same view of this objection that we now take of it.

The last two objections are—that this by-law was not made and authenticated, as prescribed by the 198th clause of the statute; and that it is invalid for not directing what is to be done with the land on which the road ran. It was not attempted, I think, to support these grounds on the argument; and there is certainly nothing in them.

Rule discharged.

ROBERTSON V. SLATTERY.

Demand of possession.

Held, that under the evidence given in this case the plaintiff might maintain ejectment, without a demand of possession.

EJECTMENT for west half of lot 30 in the 11th concession of King.

At the trial at Toronto, before Mr. Justice Burns, the plaintiff proved and put in evidence, a copy of a bill in Chancery, filed 27th March, 1852, in a suit brought by the defendant against the now plaintiff, which commenced by a statement that the present defendant entered into or “assumed the occupation” of the premises before the 22nd of February, 1849, by permission of L. W. S. acting for the plaintiff with the understanding that when L. W. S. should be in a position to sell, the defendant should be preferred as a purchaser if willing to give as much as any one else; and that the defendant made improvements: that on the 22nd of February, 1849, the defendant, entered into an agreement with S. & C., agents for the plaintiff, to buy the premises at 25s. per acre, £125, in four annual payments with interest, the first payment to be made on the 22nd of February, 1850, on making which defendant was to get a deed and execute a mortgage for the balance; that before the 22nd of February, 1850, the plaintiff came to this province from Scotland, and told the defendant that he would direct M., his new agent, to arrange with defendant in carrying the aforesaid agreement into effect; and that it was then agreed that the defendant should remain in occupation and continue to improve, and that the defendant did so make improvements worth £150; that the defendant received no

notice from the plaintiff until November, 1851, when he received notice that the plaintiff would be in Toronto to transact business, and the defendant had an interview with plaintiff, and also on several days in December, but no arrangement was made that on the 15th of January, 1852, defendant tendered to plaintiff a deed for execution, and £154 7s., but the plaintiff refused to execute or accept the money, "repudiating the contract" made by S. and C.; that the plaintiff advertised the premises for sale, and means to sell them unless prevented by injunction.

The plaintiffs also put two letters signed by the defendant; one addressed to L. W. S. and dated 22nd March, 1847, beginning "I trust you will accept this note as an acknowledgment to the necessary arrangement of ownership," and ending "I trust you will send me the requisite certificate to occupy lot No. 30, 11th concession." The other addressed to the plaintiff, dated 27th December, 1851, "I beg to lay before you a full view of my intention respecting that portion of your land which I now occupy—in the first place to give you the value of your land, which I consider to be from 4 to 5 dollars an acre, *with interest from this date*; then, Sir, you may insist anything you please in the deed or bond by entering the overplus paid." L. W. Smith was called as a witness for plaintiff. He proved that the first letter referred to the premises of which the defendant was in possession. He could not state if the plaintiff entered as a squatter or in consequence of anything witness said to him; but Mr. Crooks, in 1847, or 1848, being then the witness's partner, made a treaty to sell defendant the lot, and an entry was made in a book that it was sold to him at 25s. per acre; the first payment to be made in a year with interest.

The learned judge directed a verdict for defendant, with leave for the plaintiff to move to set it aside, and enter the verdict for himself, if the court should be of opinion that there should not have been a demand of possession before bringing the action.

In Michaelmas term *M. Vankoughnet* obtained a rule nisi accordingly, or for a new trial without costs, for misdirection, citing *Doe dem. Price v. Price*, 9 Bing. 356;

Co. Lit. 57; Doe dem. Burritt v. Dunham 4 U. C. R. 99; Doe Kemp v. Garner, 1 U. C. R. 39; Doe Stodders v. Trotter, Ib. 310; Doe Phillpotts v. Crouch, 5 U. C. R. 453; Tay. Ev. 1039, 1153.

J. Duggan shewed cause, and insisted that as the defendant entered as a purchaser he was entitled to a demand of possession—Doe dem. Roby v. Maisey, 8 B. & C. 767.

DRAPER, J., delivered the judgment of the court.

It seems doubtful whether the defendant entered as a purchaser, or made his treaty with Mr. Smith after he was in possession. At all events, he was recognized as in possession as a purchaser by Mr. Crooks in 1848. But there is no proof of Smith and Crooks's authority to sell; on the contrary, the only inference that, in the absence of evidence on this point, can be drawn, is that they had no authority in this respect to bind the plaintiff; and the statements in the defendant's bill shew that in January, 1852, at all events, the plaintiff repudiated the alleged contract entered into by them.

Besides, the only contract alleged was to pay by instalments, and none were paid, not even any offer made to pay until January, 1852, when if there ever had been a contract the plaintiff expressly repudiated it; it may be inferred because either his agents had no authority to sell his lands, or because the defendant himself, by his letter of December, 1851, shewed that he was not then claiming to hold under such contract, but was proposing to buy these hundred acres at from 4 and 5 dollars per acre with interest from *that date* instead of at £125, with interest from the time of the alleged contract which, according to Mr. Smith's evidence, was in 1847 or 1848, probably the latter.

Admitting for the argument's sake that the defendant was at one time tenant at will to the plaintiff under the agreement made in 1847 or 1848, he had failed in making the payments and was therefore liable to be dispossessed without notice—Doe Stodders v. Trotter, (1 U. C. R. 310.) His subsequent proposal to make a new treaty, coupled with his previous failure, was in my opinion abundant, if not conclusive evidence, that the tenancy at will was at an

end, and that he was merely tenant at sufferance, and consequently not entitled to a demand of possession.

Rule absolute.

DAVIS V. BARNET.

Costs under 22 & 23 Car. II.—Judgment set aside for want of notice of taxation, to admit certificate under 43 Eliz.

In trespass *qu. cl. fr.*, the defendant pleaded the general issue only, and the plaintiff had a verdict for 20s.—A certificate under 22 and 23 Car. II., was moved for at the trial, and refused.

Held—confirming *Hawkes v. Richardson*, 9 U. C. R. 229, that the plaintiff was entitled at least to county court costs; but the judgment having been entered without notice of taxation, the court set it aside as irregular, in order to give the defendant the advantage of a certificate under 43 Eliz. ch. 6, which had been obtained after judgment, and therefore too late.

The plaintiff declared in trespass *qu. cl. fr.*, for that the defendant, on, &c., broke and entered a certain close of the plaintiff, (describing it), and trod down and consumed the grass of the plaintiff there growing, and also there cut down and prostrated, and destroyed the trees—to wit, forty oaks, &c.; and the underwood of the plaintiff, of the value of £50; and the timber, wood, branches, and bushes thereof coming and rising; to wit, ten loads of timber, ten loads of wood, &c., of the value of £10, took and carried away, and converted and disposed thereof to his own use, &c.

The defendant pleaded (not “by statute”) that he was not guilty of the said trespasses, or any, or either of them, or any part thereof, in manner and form, &c.

The evidence was, that the defendant set people to cut trees on his land, which joined the plaintiff's land, and pointed out where they were to cut, and that they did in fact cut some trees on the plaintiff's side of the line, as proved by a surveyor who ran the line.

A certificate was applied for at the trial, and refused.—Judgment was entered on the 14th of December, 1852, without notice of taxation having been given; the costs were taxed at £20 14s. 7d., being the full costs of suit.

On the defendant's application, an order to revise the taxation was obtained from the Chief Justice of the Common Pleas, on the 1st of February, 1853.

On the 2nd of February, the defendant applied for, and obtained, from Draper, J., who tried the cause, a certificate

under 43 Eliz. ch. 6, that the damages to be recovered in this action did not amount to more than twenty shillings; and on the same day the master revised the taxation under the order granted, and allowed the same costs as before, under the authority of a case of *Kane v. McGill* in 2 C. P. 151, notwithstanding the certificate that had been granted under 43 Eliz.

On the 5th of February, Macaulay, C. J., made an order that the proceedings should be stayed on the *fi. fa.* till this term, in order to enable the defendant to move the court against the master's allowance on the revision;—(the costs of this application to be in the discretion of the court, if the taxation should be confirmed).

The goods of the defendant had been levied on under the *fi. fa.*, to the full amount, in January last.

M. Vankoughnet obtained a rule to shew cause why the master's allowance of full costs upon revision, on the order made in chambers, should not be set aside, on the ground that the plaintiff is not entitled to more costs than damages: viz., twenty shillings; there being no certificate granted under the stat. 22 & 23 Car. II., to entitle him to full costs and because a certificate had been granted to the defendant under the statute 43 Eliz., to deprive the plaintiff of costs; or because, at most, the plaintiff is only entitled to county court costs, the verdict being within the jurisdiction of the county court;—or why the judgment signed, the taxation and the execution thereon, should not be set aside, or the judgment amended by striking out what relates to costs, on the ground of there having been no certificate under the stat. 22 & 23 Car. II., and of there having been a certificate granted under 43 Eliz., and because no notice was given of taxation.

Eccles shewed cause. In addition to the cases cited in the judgment—*Lyons v. Hyman*, 20 L. J. (Ex.) 1, was referred to, for the plaintiff: and *Patrick v. Colerick*, 4 M. & W. 527; *Mills v. Stephens*, 3 M. & W. 460; *Hughes v. Hughes*, 2 Cr. M. & R. 663; *Foxall v. Banks*, 5 B. & Al. 536, for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

I think in this case, as in *Hawkes v. Richardson* (9 U. C.

R. 229), lately decided in this court, we are bound by the current of authority in England (though there seems to have been from the beginning an unfortunate perversion of what must have been the intention of the statute) to hold that where the general issue only is pleaded to an action of trespass *qu. cl. fr.*, upon which plea the title cannot now come in question; and where also, as in this case, an *asportavit* of goods is charged, though in the same count, and a general verdict is given—the plaintiff is entitled to full costs without a certificate. Perhaps, however, upon the latter ground there may be doubt whether the trespass to goods is laid in this declaration as matter of aggravation merely, or as a substantive trespass sufficiently to bring the case within the rule. It is of no consequence to determine that, if the other ground is decisive, as I think it is; namely, that the general issue only is pleaded to the count for trespass *qu. cl. fr.*

But on the second point of the rule, we think it is in the discretion of the court to deal with that as irregular, which was done in disregard of a rule of court; and that, although it is not incumbent upon us to set aside a judgment as irregular because notice of taxation of costs was not given, yet that we may do so in order to give the defendant the advantage of the certificate granted under the statute 43 Eliz., by the learned judge who tried the cause. We think the case of *Ilderton v. Sill*, reported in 15 L. J. (C. P.) 1 & 9 Jur. 894, authorizes that course, and it is just; because, if notice of taxation had been given as the rule of court directs, the defendant might have obtained his certificate in time. And if that course were not open to us, we might in this case perhaps, as in *Hawkes v. Richardson*, have considered that the allowance should be confined to county court costs, upon the principle that we are not to be guided in that respect by what the plaintiff could go for under his declaration, but by what he did go for. The late case in England of *Latham v. Spedding* (15 Jur. 576, 4 Eng. Rep. 273), affirms that principle, which was early acted upon in this court in *Stoddart v. Gardner* (Dra. Rep. 101.) This depends, however, more immediately upon the proper effect to be

given to the 5th and 59th clauses of our statute 8 Vic. ch. 13. The county courts have jurisdiction of cases of torts to personal chattels, where the title of land *shall not come in question*; and any suit in which damages have been given upon a record on which title to lands *might* have come in question is not necessarily a suit which was not of the proper competence of the county court, if it contains also a statement of a cause of action, upon which alone, for all that appears, the plaintiff may have recovered, which did not necessarily involve any question of title to lands. The judge who tried the cause is in a position to know what the fact really was, and it does not seem reasonable that this view should be bounded by the record alone, in which the plaintiff may have included some cause of action which the inferior court could not have tried, for the express purpose of ousting the jurisdiction of the lower court.

In this case, as well as in *Hawkes v. Richardson*, we consider ourselves bound by the practice which has been established by the current of authority in England, although we do so reluctantly, for it is impossible not to feel what has been often expressed by judges in England, that the decisions upon the statute of Car. II., have unfortunately led to a course unreasonable in itself, and at variance with the evident intention of the legislature. In *Clegg v. Molyneux* (Doug. 780); Lord Mansfield observed, "There is a puzzle and perplexity in the eascs on this statute, and a jumble in the reports." And I think the inconvenience has been a good deal added to since.

The present application came before the learned Chief Justice of the Common Pleas, in chambers; and it was said in the argument before us, that he desired the defendant to move the matter in full court here, being embarrassed by an apparent conflict between our decision in *Hawke v. Richardson* and the case of *Kane v. McGill* (2 C. P. 151), which had been decided in the Court of Common Pleas. I think the learned Chief Justice must have misconceived the case of *Hawkes v. Richardson*, if he was under the impression that it is at variance with *Kane v.*

McGill in regard to the effect given to the 22 & 23 Car. II. What was intended to be resolved by us in that case is perhaps obscurely expressed, for I observe that in the argument of the present rule, Mr. Eccles, who sees as readily and distinctly as any one the points and bearings of a case, declared himself unable to understand it. If it is read over again, I think no such difficulty will be found. We determined there in favor of the plaintiff so far as regarded the statute of 22 & 23 Car. II., and held him entitled to full costs, on the ground that there was a separate count for goods taken, and a general verdict, wherefore we could not say that the plaintiff did not recover in part, if not wholly, for taking the goods, in regard to which cause of action the title of the land could not have come in question; and therefore we must say, adopting the principles of the English decisions, that it was not a case in which the judge could have certified, and so must be looked upon as not coming within the statute. The English cases compelled us, as we thought, to give the plaintiff his full costs so far as the statute 22 & 23 Car. II. was concerned, because it was not a case for a certificate; and so the plaintiff, out of deference to the impossibility of getting it, must be regarded as being in as favorable a position as if he had obtained it. This is the result of the English decisions, however repugnant it may seem to common understanding, and we did not depart from the rule, though I confess I should for my own part be willing in this matter of practice to have concurred with the rest of the court in following the statute rather than the cases. Having determined, however, in *Hawkes v. Richardson*, that the plaintiff, so far as the statute of Car. II. was in question, was upon English authorities entitled to his costs, on the grounds I have mentioned—namely, the verdict being general, and the declaration containing a count for taking goods—it was immaterial to consider what might have been the effect of the general issue having been pleaded “by statute” to the declaration which might have admitted of the title to land being brought in question upon the first count, supposing that to have stood alone.

In limiting the plaintiff to county court costs, as we did in *Hawkes v. Richardson*, we followed the course early adopted in this court, in *Gardiner v. Stoddard*, and which has since received confirmation by English decisions, (among them is the case of *Latham v. Spedding*, 15 Jur.576), and might possibly have adopted the same course in this case, if we had not thought it proper under the circumstances to give the defendant the benefit of the certificate which has been granted to him under the statute of Eliz., and which places him in a better situation. The object of legislature in all the acts, which relate to this subject, was to discourage bringing vexatious actions upon frivolous grounds, and their enactments to that end should have received a liberal construction. If just after the statute 22 and 23 Car. II. was passed, any one who had concurred in passing it had been asked what would be its effect in case one man should take a biscuit out of the hand of another, and being sued for it in trespass, should have a verdict passed against him for a farthing, the answer, I think, would have been that he would have his own costs to pay under the new law, for that the action would be undoubtedly a personal action, and the damage under 40s.; and as in the nature of things the title to lands could not come, in question, the plaintiff could in such a case obtain no certificate to give him full costs, and so must be content with the farthing. It would have seemed to him hardly credible, I think, if he had been told that when the statute should come to be acted upon, which it was not I believe for a very long time after its passing, it would be held by the courts that the very circumstance which he supposed would make it impossible for him to obtain full costs, was precisely the thing that would give him his full costs; namely, the circumstance that the judge could not certify in his favour without certifying a falsehood, for that the judge would hold such a case to be out of the statute altogether, and that the plaintiff would in consequence be left to tax his full costs.

If indeed we could suppose a case in which the title to land might consistently with the record have come in

question upon the trial, but yet for some cause the judge who tried the case was disabled from granting a certificate, there would then be a good reason for protecting the plaintiff in his costs, since he ought not to suffer from being unable to obtain a certificate of the truth if that would serve him; but when the only reason for the judge not certifying in his favor is, that it would be idle to ask him to certify a fact which could not possibly have existed, the consequence, as it seems to me, should have been altogether in the defendant's favor, for the fact that the title to land *could not* have come in question might reasonably have been held equivalent to the judge declining to certify that it did come in question.

However, I only make these remarks in the hope that they may assist in keeping in view the propriety of placing this matter on a more reasonable footing by a legislative enactment.

In disposing of this rule we conform to the English authorities, as we did in *Hawkes v. Richardson*; holding the plaintiff at liberty *prima facie* to tax his full costs, notwithstanding he has obtained no certificate under the statute 22 & 23 Car. II., but we direct that the judgment which he has entered up without notice of taxation to the defendant shall be set aside, in order that the defendant may have the benefit of the certificate which has been granted to him under the statute 43 Eliz. ch. 6, reducing the costs to twenty shillings; and the execution to be issued will of course conform to the judgment as it will be entered. The execution that has issued must of course be set aside.

We set aside the judgment and proceedings under it without costs, and the order will issue to revise taxation, in order to give effect to the certificate for restraining costs.

Rule accordingly.

GILMOUR V. HALL AND PLATT.

Appeal—Practice—Stay of execution.

Where a *fi. fa.* has been placed in the sheriff's hands, and acted upon before the defendant has appealed,—*i. e.*, before the writ of appeal has been allowed—there can be no stay of execution. The sheriff must sell the goods and pay the money into court, to abide the event of the appeal.

This was a case of appeal from the decision of this court in *Hall & Platt v. Gilmour*, 9 U. C. R. 492.

Security for the sum awarded by the judgment, and costs, was given according to the statute, and after due notice was allowed by a judge, on the 10th of January, 1853, and filed.

On the 8th of December, 1852, a *fi. fa.* had issued on the judgment against the defendants' goods, returnable the first day of Hilary Term, and was placed in the sheriff's hands. On the 24th of January, 1853, the plaintiff's attorney and the sheriff were made aware of the allowance of the security; and on the 29th of January reasons of appeal were notified to the plaintiff's attorney.

The verdict was for £418.

On the 1st of February, 1853, the defendants moved in chambers, and obtained an order from the Chief Justice of the Common Pleas, to stay all further proceedings on the *fi. fa.* until this term, in order to give an opportunity for making this application.

M. Vankoughnet in this term (10th February, 1853,) obtained a rule *nisi* on this plaintiff and the sheriff of the United Counties of York, Ontario, and Peel, to shew cause why the sheriff should not abandon further proceedings on his *fi. fa.* in this cause, on the ground that execution is stayed under the statute (12 Vic. ch. 63) by reason of the proceedings in appeal taken by the defendants; or why the sheriff should not desist from making the money under the writ, until the issue of the said appeal.

Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon further consideration of the point raised in this case, we have not changed the opinion which we formed in the case of *Rowand v. Jarvis*—that there is nothing in

our statute 12 Vic. ch. 63, or in the rules respecting appeals made under its authority, which would warrant us in holding—contrary to the principles and practice which have always hitherto prevailed in England—that an execution commenced before an appeal has been allowed must not be suffered to go on, notwithstanding the appeal. In England—as the case also was in this country before the late statute—the party dissatisfied with a judgment obtained his writ of error or appeal as of course, though it could not be allowed till security had been given—that is, before bail put in; and until notice of allowance the appeal would not operate as a supersedeas of the execution. It may, perhaps, be right to hold that, upon the second of our appeal rules made in July, 1850, the writ cannot properly issue here until security has been perfected; but it does not appear to be material whether perfecting the security must precede the issuing of the writ or not; because, however, that may be, it is clear that two things must concur before execution or judgment will be stayed; namely, the allowance of the writ of appeal under the 15th rule, by indorsement to that effect, after security has been perfected, and the service of notice of such allowance, with a statement of some ground of appeal, which shall not be manifestly frivolous, as required by the 27th rule. This cannot take place before a writ has issued, because it cannot be endorsed “allowed” until it has been taken out; and, therefore, in the case now before us, the defendants are not yet in a situation to demand a stay of execution, not having obtained their writ.

But if they had obtained their writ of appeal, and had it allowed, and had given the notice required by the 29th section, we are still of opinion that the writ of appeal would be a supersedeas of the execution under the 27th section, in a case where, as in the present, the sheriff had actually seized goods of the defendants under a *fi. fa.* before the defendants had appealed—that is, before they had their writ of appeal allowed; and that in such case the sheriff must sell the goods and pay the money into court to abide the event of the appeal—*Meriton v. Stevens* (Willes 271, 280,) *Doe dem. Messiter v. Dyneley* (4 Taunt. 289.) This principle

appears to be still maintained in England, on account of the inconveniences which might ensue from interfering with the progress of the execution after goods had been seized under it.

We can find nothing either in the statute 12 Vic. ch. 63, or in our rules of court, which should lead us to place this matter on a new and peculiar footing, for the words that are used in the 40th clause of the act—that on the perfecting security “*execution shall be stayed*,” cannot, we think, without some clear legislative direction to that effect, be carried further than the very same words used in English acts and rules, of practice, and in our own statute of 34 Geo. III., ch 2, which have never, that we can find, been taken to mean more than that after such allowance and notice execution shall not go on the judgment; not that the completion of an execution shall be interrupted where it has issued and been acted upon before the appeal was allowed.

Rule discharged, but without costs.

HOLMES V. VANCAMP.

13 & 14 Vic. ch. 62—*Affidavit required by.*

The 13 & 14 Vic. 62, requires that the *mortgagee himself*, shall make affidavit of the mortgage debt being due, and that the mortgage was made in good faith; therefore a mortgage filed upon an affidavit of an agent of the mortgagee, was held void.

The defendant in this case was shewn to be a creditor of the mortgagor at the time such mortgage was given; it was held therefore, that such mortgage was void as against him at the first; and the court refused, on the suggestion of the mortgagee, to entertain any questions as to the regularity of the defendant's judgment entered after the date of the mortgage, or of an attachment issued upon it.

APPEAL from the county court of Northumberland and Durham. The plaintiff sued the defendant in trover for a yoke of oxen and a cow.

The defendant pleaded—1st. Not guilty. 2nd. The plaintiff not possessed of the goods, &c.

One Warrant owned the oxen and cow, on the 12th of October, 1850, when he executed a mortgage of them, and of other personal property specified in a schedule, and worth

about £35 to Holmes, the plaintiff, to secure him in the amount of £28, due by Warrant to one Hunt, for which debt Holmes had become surety, and afterwards paid it. Upon the trial Warrant was examined as a witness, and swore that he gave this mortgage with a view to get time to pay his other creditors; that he owed at that time several other debts, and among them a debt of £7 or £8, to this defendant Vancamp;—Warrant was then a tenant of Holmes, and the cattle which he mortgaged remained in his possession, on the place leased by him, notwithstanding the mortgage.

On the 19th of October, 1850, an affidavit was made of the execution of the mortgage, and the mortgage was filed with the county clerk on the 21st of October, but it was not till the 28th of November, that an affidavit was made of the *bona fides* of the mortgage, which was filed on the 26th, and this affidavit was not made by the mortgagee, as required by the statute 13 & 14 Vic. ch. 62, but by one Cubitt, who, it seemed, was his agent.

On the 1st of October, 1850, Vancamp took out a summons from the division court against Warrant for the debt due to him, of £7 6s. 3d., returnable on the 29th of October, which was indorsed “served by Peter Coleman, 19th Oct., 1850.” Judgment was obtained on this summons on the 17th of December, 1850, and execution issued. On the 19th of October, while the suit was pending, but whether before or after service of the summons did not appear, an affidavit was made for the purpose of suing out an attachment in the case. It purported to have been made *by J. & J. Vancamp*, and was to the effect that Warrant owed them £7 6s. 3d., for goods sold, &c.; and that they had good reason to believe that Warrant was then concealed within the county, to avoid being served with process, with design to defraud them of their debt. The apparent inconsistency between this affidavit and the indorsement made on the summons, of its having been actually served on the same day on which the affidavit was made, was not explained. The affidavit, besides purporting to be a joint affidavit of J. & J. Vancamp, was signed in the same manner, without

anything to shew by the signature or otherwise which of the firm made it. Upon the attachment which issued under this affidavit the oxen and cow were seized in Warrant's possession, but were restored to him on his giving a receipt, and undertaking that they should be delivered up when called for. On the 8th of January, 1851, a bailiff seized the oxen and cow, under the division court execution which had issued in Vancamp's suit; they were sold, and Vancamp, the now defendant, received the proceeds of the sale.

For the plaintiff it was contended at the trial of this case in the county court, that the defendant could make out no defence under the attachment, because he had not pleaded it specially. Secondly, that it was void, because it was not warranted by a sufficient affidavit, and so it could not prevail against the mortgage.

The defendant, on the other hand, contended that although the attachment issued after the 12th of October, when the mortgage was made, yet that it was executed on the 19th of October, before the mortgage was filed as required by law, and even before any affidavit of the mortgage having been taken *bona fide* had been made; and further, that no sufficient affidavit in this respect had ever been made, for the law requires that the mortgagee himself shall make it, which had not been done in this case, so that, putting the attachment out of the question, the mortgage had never attached on the property, but was absolutely void as against Vancamp, a creditor, and could not prevail against his execution when the bailiff came in January, and seized under it. Another objection was taken by the defendant; namely, that by the mortgage to Holmes the debt was not made payable till the 15th of April, 1851, which had not arrived when Vancamp's execution came, and the goods were seized under it in Warrant's possession, where they had a right to be, and that Holmes, not being at that time entitled to the possession, was not in a situation to sue for the conversion.

The learned judge directed the jury to find for the plaintiff for the value of the cattle, which they did and he

reserved leave to the defendant to move in term for a nonsuit, on the objections which he had taken.

A rule nisi was afterwards granted, upon the defendant's motion for a nonsuit or for a new trial, on the ground that the jury were misdirected, and that the verdict was against law and evidence.

The learned judge determined that there could be no doubt that under the pleas of "not guilty" and "the plaintiff not possessed," the defendant could object to the plaintiff's title under the mortgage; and that the affidavit required by our statute 13 & 14 Vic. ch. 62, must be made by the mortgagee himself, and not, as in this case, by an agent; wherefore the mortgage had not been legally registered. But on the point that the attachment had been sued out upon an illegal affidavit, he held that objection to be fatal; that the affidavit was a nullity, and the attachment therefore void, and the defendant liable for the seizure made under it. He thought the seizure under Vancamp's execution justifiable under the evidence, but not the seizure under the attachment, which he considered must entitle the plaintiff at all events to nominal damages; and he made a rule to the effect that the plaintiff's verdict should be reduced to 1s.; or, if he objected to that, as not being in the power of the court to order upon the rule nisi that had been obtained, then the rule should be made absolute for a new trial without costs.

The plaintiff appealed from this judgment, contending that he was entitled to have the verdict upheld for the full amount which was given by the jury as the value of the cattle; and that the judge of the county court had no power, upon such an application as was made to him, to reduce the verdict to nominal damages.

Cameron, Q. C., for the appeal, cited *Smith v. Pritchard*, 8 C. B. 565; *Buchanan v. Kinning*, 17 L. Times, 244; *Dews v. Ryley*, 20 L. J. (C. P.) 264.

Wilson, Q. C., contra, cited *Doe dem. Sturges v. Ward*, 2 Dowl. N. S. 706; *Kingston v. Llewellyn*, 1 B. & B. 529; *King v. Turner*, 1 Ch 58; *Brown v. Davis*, *Ib.* 161; *Walker v. Farnell*, 4 Ex. 807.

ROBINSON, C. J., delivered the judgment of the court.

We think the judge of the county court was right in holding that the statute 13 & 14 Vic. ch. 62 imperatively requires that the mortgagee himself shall make affidavit of the mortgage debt being due, and that the mortgage was made in good faith for the purpose of securing the debt, and not for the purpose of protecting the goods mortgaged against the creditors of the mortgagor. According to Warrant's own evidence in this case, it might not have been possible for Holmes to make such an affidavit; for Warrant swore "that he made the mortgage with a view to get time to pay his other creditors;" and if Holmes knew this and did not apply for security, but merely suffered Warrant to give it for his own purposes, and agreed that he should be undisturbed in his possession of the goods, he could hardly have made such an affidavit as the statute requires: and at any rate, the statute is express that *the mortgagee* shall make such an affidavit, which must accompany the mortgage when it is taken to the county clerk to be filed, otherwise the mortgage shall be absolutely void. There are obvious reasons which may have influenced the legislature in requiring that the mortgagee himself should make the affidavit, and not any agent or other person on his behalf; and, at all events, the statute is express. We cannot alter or dispense with its provisions; and, if we could, there is no ground shewn for any dispensation in this case. The cases cited of affidavits made by clerks or agents for the purpose of personal arrest, either in England under the statute 12 Geo. I. ch. 29, or in this province under our own statute, are not in point; because in the one case the statute allows the affidavit to be by the party, his servant, or agent; and in the other case the statute requires only that an affidavit of the debt shall be made, without saying by whom. No case can be an authority, unless where the affidavit has been received under a statute express and peremptory as this is. This being so, the mortgage cannot be upheld against Vancamp a creditor, but must be treated by us as void; independently of the question whether the delay alone of many weeks before it

was taken to be filed did not make it void under the statute 12 Vic. ch. 74, the possession of the cattle having continued in the mortgagor.

Vancamp is now shewn to be a judgment creditor, entitled to question the validity of the mortgage. We can go into no examination of the regularity of the judgment upon the suggestion of Holmes, who is a stranger to it that the summons was not served; and strange and incomprehensible as the proceedings connected with the attachment seem to have been, that is of no moment, for Vancamp is not less a judgment creditor, nor less entitled by reason of any irregularity of that kind to object against the mortgage. It is established clearly that he was in fact a creditor when this mortgage was given; and when he shews that, he compels us to hold the mortgage void as against him from the first, and not merely from the time that his judgment was entered.

It is unnecessary to consider whether the plaintiff, upon the evidence, should have had a verdict for anything in his favour, and whether the defendant should not have succeeded in his application for a non-suit, for it is the plaintiff, and not the defendant, who appeals. The defendant is content to let the matter rest where it is. We think it very clear that the plaintiff has, to say the least, no reason to complain of the judgment, and that the appeal must therefore be dismissed with costs.

Appeal dismissed.

SUTHERLAND V BLACK.

The court, under the circumstances of this case, granted a second new trial, a verdict having been twice found against an officer of the Court of Chancery, on insufficient evidence.

In this case the court had granted relief to the defendant against a former verdict. The facts were not made to appear in any different light upon the second trial, but the jury again found for the plaintiff.

The facts were these: On the 16th of March, 1850, the plaintiff, a farmer living in the country, went, in company with his solicitor, Mr. Cole, to pay into the court of

Chancery a sum of money required to be paid in, in a suit between him and the British American Fire and Life Assurance Company. The master in Chancery, to whom they first applied directed them to take the money to the defendant, Mr. Black, one of the clerks of the court, whose office was in the same building, and who received and entered it, saying that it would be safe there, or something to that effect, until they got the proper order for paying it in, which had not yet been obtained, but which it was said would be obtained the next day. On the following day the plaintiff's solicitor, Mr. Cole, went to the defendant in his office, and desired him to give him back this money which had been deposited with him *ad interim*, and the defendant thereupon took the money out of his desk, in which he had placed it the day before and gave it to the solicitor, whose client was not with him on this occasion.

Mr. Cole soon afterwards absconded with the money, and the plaintiff hearing of it came into town, and demanded the money from the defendant, who told him that he had given it to his solicitor who had called for it, admitting at the same time, in answer to a question of the plaintiff, that no order of the court had been produced to him.

Mr. Cole's receipt for the money was taken by the clerk, and produced upon the trial. It stated that he had received the sum which had been deposited by him the day before, and for which the receipt of the defendant, Mr. Black, had been taken, which receipt by the writing he engaged to return.

The registrar of the court was examined upon this trial, and swore, as he did upon the first trial, the money is never received into the Court of Chancery without an order, nor paid out without an order—that is, not received or paid by the court; that it was not the particular duty of this defendant to receive money; that Cole was the solicitor of the plaintiff in an interpleader suit depending in Chancery, and that a solicitor in Chancery is always considered to have control over all his client's matters in litigation, and to represent him in whatever is to be done in the suit; that the defendant was under no obligation to receive the

money, either from Cole or his client, without an order; and that the money was under the circumstances not under the control of the court, not being yet regularly paid in, but subject to the order of the depositor or his solicitor. He stated further that if he had been in the place of this defendant he should without hesitation have returned the money to the solicitor when he called for it the next day.

It was a matter uncertain upon the evidence whether the money was received on the first day from the hand of the client or of his solicitor, Mr. Cole; but the jury were told that it signified nothing how that fact was, as Cole was in reality the plaintiff's solicitor, and known to be such, and they went there in company together.

The jury were directed on this occasion as on the former, that the defendant was well warranted in returning the money to the solicitor when he called for it, as it had been paid in apparently under the advice of the solicitor, and in his presence, if not through his hand: that the clerk, having taken charge of the money for the accommodation of the party till he should get the order, which ought to have been got before, should be placed in no worse situation on that account than if it had been accompanied by an order of the court; that the defendant had no reason, from anything that appeared, to suspect any fraud in the solicitor; that he would have taken a very unusual responsibility upon himself if he had questioned the right of the solicitor to represent his client when he called the next day, and might have made himself liable in consequence of such refusal, if the money had been lost before the client came for it, or if any disadvantage had accrued to the client in the progress of the cause, from the money having been withheld from his solicitor.

The jury nevertheless on this occasion again gave their verdict for the plaintiff.

Vankoughnet, Q. C., moved for a new trial.

J. Boulton, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The amount in this case is not large—upwards of £70—but the principle involved is a very important one. The

sum might have been £700 instead of £70, and the same law should govern in the one case as in the other. It is our duty not to suffer parties to be ruined by the perversion of the law. The clerks and officers of courts of justice are frequently placed in very responsible situations, and have duties to perform that may put them in great peril when they make a slip in discharging them. Whenever they do wrong, either by design or from negligence, they must abide the consequence; but, on the other hand, they have a right to expect protection to this extent—that they shall not be adjudged liable when they have done nothing, or omitted nothing, that should make them liable. If the plaintiff had been told when he met with this loss, that it was a misfortune brought upon himself by happening to place confidence in an unworthy solicitor, and that he could not and ought not expect to be able to throw the loss upon a public officer, who had only done what was proper under the circumstances in recognizing the authority of the person whom the client himself had chosen to represent him, much expensive litigation would have been saved. The verdict was attempted to be supported by urging that the defendant may have been fraudulently in collusion with the solicitor, Mr. Cole. Upon the trial the jury were earnestly pressed to act upon that idea, and they probably did so, though there was really nothing in the evidence given upon either trial to support such a surmise, and so the jury were reminded. It seems like adding greatly to the vexation of a groundless lawsuit to attribute arbitrarily to the defendant anything so disgraceful, and to attribute it only because a recovery could be expected upon no other ground. We regret very much that it has become our duty to order another trial, and without costs, but we consider that the due administration of justice requires it.

Rule absolute.

PRYNNE V. CARROLL.

Practice—Assessment of contingent damages.

There can be no assessment of damages where a verdict is found for defendant on an issue going to the whole cause of action.

The plaintiff sued the defendant in case, setting forth a writ of *fi. fa.*, delivered to the defendant in a suit of this plaintiff against one Hill, in a judgment in the county court of Oxford; averring that the defendant seized goods of Hill under the writ to the amount of the debt, but forebore to sell the same, though he could have done so, and falsely returned that the goods remained unsold in his hands for want of buyers.

The defendant pleaded 1st.—Not guilty. 2nd. That Hill was not possessed of the goods and chattels in the declaration mentioned, &c.

3rd. That the defendant did not seize any goods, &c.

4th. That he did not levy the money endorsed on the said writ, as in the declaration mentioned.

5th. That there were not at the time of the delivery of the writ to the defendant, or afterwards, while the writ was in force, any goods of Hill sufficient to satisfy a year's rent, due from Hill to one Tallman for the house wherein the goods were at the time of the seizure, of which the plaintiff had notice.

6th. Another plea to the same effect, stating 60*l.* to be the amount of the year's rent due.

7th. Another plea to the same effect.

The plaintiff joined issue on the first four pleas, and demurred to the last three. The defendant joined in demurrer.

A *ven. fac.* was awarded to try the issues, and assess contingent damages on the demurrer.

On the trial the jury found a verdict for the defendant.

Hagarty, Q. C., moved for a new trial, or for a *venir de novo*, "or to set aside the verdict without costs, so far as "the same relates to the issues raised on the 5th, 6th, and "7th pleas, the same being issues in law on which damages "should have been assessed for the plaintiff, there being a "general verdict for the defendant."

J. Duggan shewed cause, and cited *Warwick v. Cox*, 1 D. & L. 986.

ROBINSON, C. J., delivered the judgment of the court.

There could be no assessment of damages for the plaintiff when the verdict upon the issues in fact was found against him, and his cause of action was not sustained; of course the party succeeding on the demurrer receives his costs.

Rule discharged.

JOHNSON ET AL. V. MCKENNA.

Proviso in 4 Wm. IV. ch. 1, sec. 17—Want of appearance on N. P. record in ejectment.

A person holding a bond for a deed from the patentee of the crown is not so "entitled to the land" that his knowledge of an adverse possession for more than twenty years will take the case out of the proviso in 4 Wm. IV. chap. 1, sec. 17.

The want of an appearance on the *Nisi Prius* record in ejectment may be amended after trial; but the objection is waived, and the amendment unnecessary, if the defendant appear at the trial, and go into his defence.

EJECTMENT for lot number six, in the seventh concession of the township of Murray. The case was tried at Cobourg, in October, 1852, before Draper, J. It appeared that by letters patent, dated 30th June, 1801, this lot was granted to one James Johnson, in fee; and it was proved that John Johnson was his eldest son and heir-at-law; James Johnson, the patentee, died about twenty-three years before the trial. There was some evidence of a bond given by him to one Van Alstine, for the sale of this lot, and the patent was in the possession of Van Alstine's widow, after Van A.'s death, and she gave it up with a quit-claim of any right she had to one of the Johnsons, together with a patent. The defendant claimed title under a deed dated 13th Sept., 1822, made "between Daniel Johnson of the township of Ernest-town, yeoman, heir-at-law of the late James Johnson, of the first part, &c., and Henry Ruttan, of the second part." There was evidence that James Johnson, under whom the plaintiff claimed, never lived in Ernest-town. The patentee was described as of the township of Ameliasburg, where it was sworn the plaintiff's father lived for thirty years; besides which, the deed under which the defendant claimed was sworn to have been executed at the time it bore date, which was rather more than thirty years

before the trial; and the plaintiff's father, according to the evidence, lived six or seven years after that. Evidence was given to prove an adverse possession of more than twenty years, but there was nothing to take the case out of the proviso in the 17th section of the Real Property Act, 4 W. IV. ch. 1. After the defence had been more than half gone through, it was discovered that the *Nisi Prius* record was not properly made up,—the appearance by the defendant not being set out according to the statute. The case was however proceeded with, and the only question left to the jury was, which of the two James Johnsons was the original patentee; and they found it was the plaintiff's father, and gave a verdict for the plaintiff.

In Michaelmas Term *Vankoughnet*, Q. C., (with whom was *Cameron*, Q. C.,) obtained a rule *nisi* for a new trial; 1st. on the ground of the defect in the record; 2nd. on affidavits of the discovery of material evidence.

In the same term *Eccles* obtained a rule *nisi* to amend the record, by adding thereto the appearance of the defendant as if the same had been entered before trial, without costs.

The affidavit on which the defendant moved was that of David McWhirter, who was the son of Ursula VanAlstine, (the widow of Alexander VanAlstine), by her second husband, David McWhirter. He stated to the best of his belief that James Johnson, the patentee of the crown, sold this lot to Alexander VanAlstine, and gave him a bond for a deed; that after VanAlstine's death, this bond, with the patent for the lot, remained in his (defendant's) mother's possession, till within fifteen months, when he delivered them to William Johnson, one of the plaintiffs, who purchased the interest of Mrs. McWhirter, (VanAlstine's widow) in the premises held by her "under the will of the said Alexander VanAlstine," and who clearly acknowledged the right and title of those representing the said Alexander VanAlstine in the premises; that William Johnson, when he made such purchase, was aware that the lot was in the occupation of the defendant and one Maybee, claiming as owners; that as far back as 1830 or 1831, deponent and his mother knew that Henry Ruttan, Esq.,

had sold this lot, as claiming to be owner of it, "*to a person then in possession*, claiming to hold the same;" that he and his mother complained to Ruttan of the hardship of his claiming and disposing of the lot; that his mother sold to William Johnson by his advice, because they considered they had lost all right to the lot from the long possession by Ruttan and those claiming under him; that Meyers, the plaintiff's attorney in the cause, offered him 7*l.* 10*s.* for his mother's right in the lot, and the papers.

On shewing cause to the defendant's rule, affidavits were put in, sworn by both plaintiffs; one of whom was the son and the other (William) the grandson of the patentee, James Johnson. They denied that they had any knowledge of any person being in possession of this land, until 1839; and William Johnson swore that he went to Mrs. McWhirter, with his father's consent and direction, as they heard she held a bond for a deed given to her former husband, Alexander VanAlstine, by James Johnson before he obtained the patent; and that it was to prevent such bond interfering with their right to recover that induced William Johnson to pay Mrs. McWhirter a sum of money, to get the same from her. An affidavit was also put in by Mr. Meyers, denying any interest in the suit except as attorney.

The defendant, in reply, insisted upon the objection to the record, which the plaintiff's counsel contended was waived by the appearance and defence gone into at the trial. The defendant's counsel also argued, that notice of the occupation of the premises to Mrs. McWhirter, when she held the bond from James Johnson, would be sufficient to bring the case within the proviso to the 17th section of the Real Property Act, 4 W. IV. c. 1, especially as William Johnson was made aware of this when he bought up the bond.

In support of the amendment, the plaintiffs counsel cited *Halhead v. Abraham*, 3 Taunt 81; *Doe v. Dolman*, 7 T. R. 618; *William v. Strahan*, Ib. 309, and several other authorities. He also objected that it was not shewn, as an independent fact, that the defendant had entered an appearance—he *might* have pleaded without doing so, and the plaintiff might have accepted the plea and proceeded with the action.

DRAPER, J., delivered the judgment of the court.

As to the amendment.—In *Grundy v. Mell* (1 N. R. 28,) the rejoinder concluded with a verification, and the plaintiff added a similiter, and took the record down to trial, when the defendant obtained a verdict, and the court made absolute a rule to amend, and discharged a rule *nisi* for a new trial, founded on this objection. They relied on the case of *Sayer v. Pocock*, (Cowp. 407,) where after verdict for the plaintiff the court amended replication by adding “*and the defendant does so likewise;*” Lord Mansfield, among other reasons, stating “that by amending the court only make that right which the defendant himself understood to be so by his going down to trial.”

Our statute 14 & 15 Vic. ch. 114, section 2, enables the persons named as defendants in the writ of summons in ejectment to appear, and by section 4, an appearance without notice confining the defence to part, shall be considered as a defence for the whole property claimed. Section 6 enacts that in case an appearance be entered, the case shall be at once considered at issue, “and the record for trial shall be made up, setting forth the writ, stating the appearance, with its date;” setting forth the notice limiting the defence, if there be one; and setting forth a plea “that the plaintiff is not entitled to the possession of the said property for which the defendant has appeared.”

There is no sufficient reason for our refusing to amend this record after trial; if such amendment were necessary under the circumstances, in the words of Lord Mansfield, we should “only make that right which the defendant himself understood to be so by his going down to the trial;” the objection was not discovered until the defendant had gone into his evidence, and was, in our opinion, waived.

Then, upon the merits; the title of the plaintiff, John Johnson, as heir-at-law of the patentee, seems to us to be clear; and the only defence now set up is an adverse possession of more than twenty years, and the allegation of knowledge of that fact in those who had the right in the premises; but the only knowledge shewn is in Mrs. McWhirter, whose only claim, putting the strongest con-

struction on the affidavits filed, is as devisee of her former husband, who had obtained a bond for a deed from James Johnson before the patent issued. How can she ever be said (within the meaning of the act) to have had a right of entry, or how can she be said to come within these words, "Provided always, that until the person deriving title to land in this province as the grantee of the crown, or his heirs or assigns, or some or one of them, by themselves, their servants or agents, shall have taken actual possession of the land granted, by residing thereupon, or by cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee, or any person claiming by, under, or through him, unless it can be shewn that such grantee or person claiming by, under, or through him, while entitled to the land, had knowledge of the same being in the actual possession of some other person, not claiming to hold by, from, or under the grantee of the crown (such possession having been taken while the said lot was in a state of nature), in which case the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained?" Unless the widow of Alexander VanAlstine is shewn to have had such a title as would give a right of entry on any person in possession, her knowledge must be immaterial. Here the legal estate has never been out of the grantee of the crown, or his heir-at-law, and it is not pretended that they had knowledge of the taking possession by the defendants, or by those under whom they claim, twenty years before the 23rd of March, 1852, the date of the summons in this cause. It may be observed that there is no affidavit of the defendants that they were not aware of all that McWhirter's affidavit contains before the trial took place.

Under these circumstances we see no sufficient ground for disturbing the verdict; and the authorities referred to entitle the plaintiff to a rule for amending the record, if it were necessary, which however we do not think, as the defendants by appearing and defending at the trial waived the objection. We therefore discharge the rule for a new trial.

Rule discharged.

WALROTH V. THE ST. LAWRENCE COUNTY MUTUAL INSURANCE COMPANY.

Application to insure—Policy avoided by misrepresentation of title.

The plaintiff's application for an insurance with defendants contained the following questions and answers: *Question*—"Occupied by applicant or tenant?" *Answer*—"Tenant." *Q.*—"Title by deed or how?" *A.*—"Deed." *Q.*—"Incumbered or not, if not, say no?" *A.*—"No." The plaintiff afterwards made affidavit "that he is the *bona fide* owner of the said property and of the said policy; that the said property is not and was not in any way incumbered by mortgage or otherwise." It appeared that the plaintiff was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price; and that there was a mortgage from M. to one H. including the property insured.

Held, that (irrespective of the mortgage) the plaintiff had misrepresented his title, and could not recover on the policy.

ASSUMPSIT: 1st count, on a policy of insurance of a dwelling house against fire, to recover £100. 2nd. Money received. 3rd. Account stated.

Pleas to first count—1. That the policy was obtained from the defendants by fraud and covin, wrongful concealment of certain information, material, &c., and by misrepresentation of plaintiff.

2. That defendant subscribed the policy, and it was got from them by fraud, falsehood, and misrepresentation of plaintiff concerning the title of plaintiff to said dwelling house, and by fraudulent concealment of certain facts, known to plaintiff and material to be known to defendants, as to the title of plaintiff to the dwelling house, and whether plaintiff held his title by deed or otherwise, and as to incumbrance thereon.

3rd. That the plaintiff, to support his claim, did on the 8th of May, 1851, make the affidavit mentioned in the 1st count; and defendants say, that in support of said claim there was false swearing within the meaning of the proviso in the policy—in this, that the plaintiff swore he was *bona fide* owner of the property and the policy, that the property was not in any way incumbered; that there was no other insurance on it; that he was absent at the time of the fire; that it was not occupied at the time; that he did not know the origin of the fire, but believed it was accidental; that the house was worth £150,—whereas, &c., negating each statement.

4th. That the plaintiff made affidavit, as before ; and there was false swearing in this, that plaintiff swore he then was the *bona fide* owner of the property and of the policy, whereas. &c.

5th. That plaintiff made affidavit, as before, and there was false swearing in this, that the plaintiff swore that he was the *bona fide* owner of the property and the policy ; that the property was not previously and was not then in any way incumbered, whereas one S. E. McK. then was owner thereof, and the plaintiff held as tenant to S. E. McK., and a large sum was due for rent to S. E. McK.

6th. That the plaintiff made affidavit, as before, and there was false swearing, in this, that the plaintiff swore that the property is not and was not in any way incumbered, whereas it was incumbered by mortgage.

7th. That the plaintiff made affidavit, as before, and there was false swearing in this, that the plaintiff swore he could not tell, and did not know the origin of the fire, but believed it was accidental, whereas the plaintiff did know that it was not accidental, but that the house was purposely set fire to.

8th. *Non-assumpsit* to 2nd and 3rd counts.

Replication—*de injuria* to the first seven pleas—*similiter* to the last.

The cause was tried at Cobourg, in October, 1851, before Robinson, C. J. It appeared that the plaintiff put in an application to insure, dated the 8th of April, 1850. The application was a printed form, and it contained certain questions to which the plaintiff was to answer. Among others were the questions and answers following: *Question*—"Occupied by applicant or tenant?" *Answer*—"Tenant." *Q.*—"Title by deed, or how?" *A.*—"Deed." *Q.*—"Incumbered or not, if not, say no?" *A.*—"No." The plaintiff's affidavit was also put in, in which he swore (8th of May, 1851), "that he is the *bona fide* owner of the said property and of the said policy ; that the said property is not, and was not in any way incumbered by mortgage or otherwise." It further appeared that by indenture dated the 19th December, 1844, Stewart Easton McKechnie, in

consideration of certain rents, covenants, &c., demised to John Peterkin, his executors, administrators, and assigns, lots 11, 12, 23, and 24, in block No. 5, as laid down in a certain registered plan, being part of lot No. 20, in front of the first concession of the township of Hamilton, containing one acre $22\frac{1}{2}$ poles, at a yearly rent of £9 2s. 6d., payable quarterly, with a covenant from the lessor that he would convey to the lessee in fee simple on the payment of the sum of £33 6s. 8d. for each quarter acre, besides all arrears of rent. On the 27th of December, 1848, by deed indorsed on the forgoing, Peterkin, in consideration of £100, assigned to the plaintiff all his (Peterkin's) right and title to the lease, and the land and premises therein mentioned; plaintiff to pay rent, &c., &c., and save Peterkin harmless. McKechnie's title was subject to a mortgage in fee to Robert Henry, extending over the whole of lot 20, dated the 14th of July, 1841, to secure £6000 by instalments, about £800 of which was still unpaid. There was other evidence not important as to the question determined.

A verdict was given by consent for the defendants, with leave to the plaintiff to move to enter a verdict for himself.

Vankoughnet, Q. C. (with whom was *Eccles*), moved accordingly. They cited *Barrett v. Jermy*, 3 Ex. 535.

Cameron, Q. C., shewed cause.

The points argued for the defendants were—first, that the plaintiff was not owner, as he represented himself to be in his application of the 8th of April, 1850. Second, That the property was not unincumbered.

For the plaintiff it was asserted that there was no fraudulent intention; that his answer was true—he held by deed—he did not assert thereby he owned in fee simple: that if the plaintiffs were misled, it was owing to the framing of their own questions; that the question about incumbrance must be taken to relate to incumbrances on his own title; and that the opinion of the jury should have been taken whether the defendants were injured by the misrepresentation, or the risk thereby increased, if in fact the plaintiff intended to deceive them.

DRAPER, J., delivered the judgment of the court.

Certain matters are kept out of view on both sides, which if before us would probably shew that the plaintiff could not recover. The defendants, it is said, desire that no advantage should accrue to them on these grounds, but their agent gave in evidence as part of their incorporation and by-law, that the fact of any incumbrance on the property was material for them to know.

I cannot say that I feel any doubt that the proper construction of the questions and answers relative to occupation and title is not satisfied by the fact that the plaintiff was himself a tenant subject to the payment of rent, and subject also, before he could be considered an owner, to pay at least £113 6s. 8d. The answer "tenant" implies that some one was occupying under plaintiff as owner, not that he was himself a tenant for a term, subject to yearly rents, and subject to the payment of a sum of money in gross. It is impossible to say that these are not incumbrances, and incumbrances on the plaintiff's own title. As a tenant for a term, there is the rent and right of entry, which directly affects his title as tenant. As an expectant purchaser, there is the whole purchase money due. So that if there was no mortgage paramount to plaintiff's right in either character, and affecting this land, I should think him not entitled to recover.

Rule discharged (a).

LAWSON V. MONTGOMERY.

Action of dower by husband and wife—Release by husband.

Action for dower by S. & M., his wife, in land of M.'s husband. The tenant pleaded a release under seal by S., of all *his* interest in the land. On demurrer this plea was held bad, as being no bar to the action.

This was an action of dower by S. L. and M. L. his wife, in lands of a former husband of M. L.

Plea: That after the intermarriage of demandants, before the commencement of this suit, to wit, on, &c., *the said L.* by his certain deed poll, &c., in consideration of the sum of fifteen shillings, did release unto the said tenant *all his*

(a) See *Woolmer v. Muilman*, 1 W. Bl., 427; *Hodgson v. Richardson*, H., 463; *Arn. on Ins. L.*, 581.

the said L's claim, right, title, estate, interest, and demand, of, in, to, and out of the said land and premises, with the appurtenances. Verification.

Demurrer to this plea.

J. Duggan, for the demurrer, cited 37 Geo. III. ch. 7; 48 Geo. III. ch. 7; 50 Geo. III. ch. 10; 3 Wm. IV. ch. 9.

Wilson, Q. C., contra, cited Com. Dig. "Baron and Feme," (I. 1.) (I. 2.); *Gange v. Acton*, 1 Salk. 326; Co. Lit. 351, *a*; *Ib.* 32, *b.* *Altham's case*, 8 Rep. 150, *b.*

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that this plea does not bar the action. We are not deciding that the husband could not release the action, or by other means prevent its proceeding. It is not necessary now to consider that. This plea sets up as a bar to the widow claiming *her* right that her second husband, the plaintiff, has conveyed to the defendant all *his* right, and nothing more is said. The defendant pleads that the husband, one of the plaintiffs, released to the defendant all *his* claim, right, title, interest, and demand, of, in, to, and out of this land and premises, when in fact for all that appears, he had no claim, right, title, interest, or demand, of, in, to, or out of, any part of the land. He certainly had nothing that could pass by the deed—no estate or interest in the land. His wife has a claim, no doubt, to have her dower assigned to her, but she has no estate, title, or interest in the land, till she has established her right to dower and had it measured out to her, and then being seized, her husband would become seized, in her right; but he had nothing that he could release, for he can have no claim until his wife has established hers, which she seeks to do in this action. This is not ejectment depending on any interest or seizin of the present husband, it rests wholly on the claim of the wife.

Judgment for the plaintiff on demurrer.

McDONELL v. McDONELL.

Side line of lots how ascertained—Survey—12 Vic. ch. 35, case within 36th section of Construction of 32nd section.

In the original survey of the township of K. which was made by alternate concessions, the lines in front of the first and rear of the second concessions, were run, and a single row of posts planted along the latter to divide the space into two hundred acre lots. The line between the first and second concessions was afterwards surveyed under instructions from Government, and divided off into lots of the same size.

Held, A case within the 36th section of 12 Vic. ch. 35; and therefore that the side lines of lots in the second concession should be ascertained by the posts of the original survey on the line in rear of that concession, and not by those of the subsequent survey on the division line between the first and second concessions.

EJECTMENT for part of the east half of lot 29, in the second concession of Kenyon.

The defendant claimed the tract sued for as part of the west half of the same lot.

The question between the parties was, how the front and rear angles of the lot in question were to be determined.

A verdict was taken for the plaintiff, by consent, and subject to the opinion of the court whether, on all the evidence, he was entitled to recover; if not, a verdict to be entered for the defendant; the court to be at liberty to draw any inference of fact from the evidence.

The following are the important facts of the case:—The township of Kenyon was surveyed by the late William Chewett, Esq., under instructions dated the 2nd of April, 1791, which directed him to divide the front (nine miles) into lots of 200 acres each, and make every third line of concession. His reported plan and field notes were not found in the surveyor general's office; but all the evidence shewed the survey to have been made by alternate concessions; *ex. gr.*, the line in front of the first concession was run and divided into lots, and the line in rear of the second concession was run, leaving a road north of this line and south of the front of the third concession; on the line in rear of this second concession posts were also planted, to divide the space into two hundred acre lots. Mr. Chewett run no line dividing the first and second concessions. On the 17th of May, 1802, the crown, by letters patent granted to John Dingwell lot No. 29, in the second concession of Kenyon,

containing two hundred acres, described as commencing at a post in front of said concession marked 28-29; then N. 24° W. 105 ch. 27 links; then S. 66° W. 19 ch.; then S. 24° E. 105 ch. 27 links; then N. 66° E. 19 ch., to the place of beginning. It was clear that no such post as that referred to for the place of beginning had been planted at the date of this patent.

In 1834 the inhabitants of the first and second concessions of Kenyon petitioned to have the line between the first and second concessions surveyed, which was ordered, and on the 5th of March, 1835, instructions were given accordingly to James McGillis. He was directed to divide equally the space between the front of the first and the front of the third concessions on the east and west of the township boundaries, and then to produce a line for the front of the second concession on a course about S. 60° W., making any necessary allowance to execute the same correctly, giving to each lot its due proportion, agreeably to a sketch furnished to him, and to the original survey on the ground. Mr. McGillis made a survey in pursuance of these instructions, and having run the line dividing the first and second concessions, he planted posts on that line, intended to mark the front angles of the lots in the second concession. There appeared no reason to doubt that this work was done with sufficient accuracy; and if the posts planted by him could legally determine the southern angles of lots in the second concession, then the plaintiff was entitled to retain his verdict.

After the passing of the statute 12 Vic. ch. 35, instructions, bearing date 25th June, 1850, were given to D. McDonell, Esq., (Greenfield), to make "a survey separating the unsurveyed concessions which have double fronts, in the township of Kenyon." He was called as a witness at the trial, and proved that the road in front of the third concession, was to the north of the range of posts planted by Chewett between the second and third concessions—so that the second concession, in his opinion, had a double front; he also proved that on the township line there were two posts planted, marking the road between the first and second

concessions, though no line was run through. By his evidence and that of other witnesses, if the posts planted on the northern boundary of the second concession were to be the starting points for the side lines of lots, then the verdict should be entered for defendant. The difference between the lines respectively claimed by the plaintiff and defendant was about forty links; the quantity of land in dispute was four acres and one perch.

Brough for the plaintiff; *Ross* for the defendant.

The following provisions of the statutes were referred to in the argument, and are material for the understanding of the judgment:

59 Geo. III. ch. 14, sec. 2, enacts that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts, or monuments, which have been placed or planted at the *front* angle of any lots or parcels of land in the *first survey*, intended to determine the width of such lots or parcels of land, shall be the true and unalterable boundaries of all and every such townships, concessions and lots, respectively; and the front posts, monuments, or boundaries planted at the original survey, are to govern, notwithstanding anything expressed in letters patent granting the same. Sec. 9 enacts that the *front* of each *concession*, lot, or parcel of land, shall be considered, and is declared to be, that end or boundary which is nearest to the boundary of the township from which the several concessions are numbered.

This statute was repealed by 12 Vic. ch. 35, the 32nd section of which act amplifies and enlarges the rule laid down in the 2nd sec. of 59 Geo. III. as to boundary lines; and enacts that all boundary lines, concession lines, governing points, &c., and all *side lines* and *limits* of lots surveyed, and all *posts* or *monuments* which have been placed or planted at the front angles of any lots or parcels of land, *provided the same have been*, or shall be marked, placed, or planted under the authority of the *Executive Government of the late province of Quebec, or of Upper Canada*, or under the authority of the *Executive Government of this province*, shall be, and are declared to be, the true and

unalterable boundaries of such townships, &c., concessions, &c., lots or parcels of land respectively, whether corresponding with the patent granted, &c., or not; and such township, &c., concession, &c., lot or parcel of land, shall embrace the whole width contained between the front posts, monuments, or boundaries planted or placed at the front angles of any such township, &c., concession, &c., lot or parcel of land as aforesaid, so marked, placed, or planted as aforesaid, and no more or less, any quantity or measure expressed in the original grant or patent thereof notwithstanding.

The 36th section enacts that the front of each concession in any township in Upper Canada, where only a single row of posts has been planted on the concession lines, and the lands have been described in whole lots, shall be the end or boundary of such concession which is nearest to the boundary of the township from which the several concessions thereof are numbered; then follows a proviso as to townships in Upper Canada bounded in front by a river or lake; then a proviso that when the line in front of *any such concession* has not been run *in the original survey*, the division or side lines of the lots shall be run from the original posts or monuments placed on the rear thereof parallel to the governing line determining *as aforesaid*, to the depth of the concession—that is, to the centre of the space contained between the lines in front of the adjacent concessions if the concessions were intended in the original survey to be of an equal depth—if not, then to the proportionate depth intended in the original survey.

Section 37 provides for townships in Upper Canada, in which the concessions have been conveyed with double fronts—"that is, with posts or monuments planted on both sides of the allowances for roads between the concessions."

Section 38 enacts that in those townships in Upper Canada in which *each alternate concession line* only been run *in the original survey but with fronts as aforesaid*, the division or side lines shall be drawn from posts on each side of such alternate concession lines to the depth of a concession, &c.

DRAPER, J., delivered the judgment of the court.

I understand that it was contended for the defendant that the case fell within the 37th section of the act, but it appears to me that opinion is erroneous, for the 37th section defines concessions surveyed with double fronts—"that is, with posts or monuments planted *on both sides* of the allowances for roads between the concessions." According to the evidence in this case, there was only one row of posts planted in the original survey between the second and third concessions. But the language of the 36th section seems decisive in favor of the defendant, and the case, upon the evidence seems to fall within the express definition contained in the second proviso in that section for the line in front of the second concession was not run in the original survey, and only a single row of posts has been planted on the concession lines which have been run; and the lands have been described—*i. e.*, designated or laid out, not described for patents—in whole lots.

The doubt I have felt arises upon the true construction of the 32nd section, which, while extending the language of section 2 of 59 Geo. III. omits to limit its application to boundary lines, concession lines, governing points, side lines, and limits of lots, posts, and monuments, placed or planted "*in the first survey*;" and it is open to the plaintiff to argue that the omission of those words (which are to be found in the act of Upper Canada) was intentional, and that the Legislature meant to confirm and make unalterable boundary lines, concession lines, governing points, side lines, and limits of lots, posts, and monuments, which though not run, marked, placed, or planted, at the original survey, were subsequently thereto, and before the passing of the act, placed, run, &c., under government authority; and if this be the true construction, the plaintiff is entitled to recover, for McGillis's survey was certainly made in conformity with the instructions given by and under the authority of the Government of Upper Canada. But notwithstanding this omission in the 32nd section of the words "*in the first survey*," or words of similar import, I am of opinion that the proper construction of that section

is to read it as if those words were expressly used. Many of the latter sections of the act shew a clear express intention that the original survey should govern, and be referred to, on questions arising respecting boundaries; and they give remedies adapted in express language to cases in which the original survey has not been so complete (as in the present case) as to exclude doubts and difficulties in ascertaining the boundaries of lots or concessions. Sections 35, 36, 37, 38, 39, and 40, are all of this character, referring in express language to the original survey, and warrant in my opinion, the conclusion that this case falls within and must be governed by the 36th section, and that the verdict therefore should be entered for the defendant.

Judgment for the defendant.

HEWARD V. MITCHELL ET AL.

Assignment, construction of—Evidence of actual and continued change of possession—12 Vic. ch. 74, 13 & 14 Vic. ch. 62.

A deed was executed by John N. Kline & Son, of the first part, whereby, after reciting that they had proposed and agreed to assign *all their personal estate and effects* to certain parties of the second part, they conveyed and assigned to the said parties “all and singular the stock in trade, goods, merchandise, sum and sums of moneys, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to or due or owing to the said parties of the first part, *and which are set forth in the schedule hereto annexed, marked with the letter A, and subscribed by the parties hereto of the first and seconds parts; and all personal estate whatsoever of the said parties of the first part, and all their estate and interest therein.* No schedule was attached to the deed at the time of execution, but schedules were afterwards annexed, signed *John N. Kline & Son*, John N. Kline, jun., Anthony Kline.

Held, that such deed came within the 12 Vic. ch. 74 and 13 & 14 Vic. ch. 62; that the evidence set out in the statement below was not sufficient to shew an actual and continued change of possession, and that registration was therefore necessary.

Held also, that independently of the schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline.

This was an interpleader issue, to try whether certain goods and chattels mentioned in the declaration were on the 30th of April, 1852, the property of George Hughes, John N. Kline, and John N. Kline the younger, or any or either of them.

At the trial at Toronto, before McLean, J., the facts as

proved were these:—the execution debtors it appeared were composed of two firms; one, Messrs. Hughes, Kline & Son, who carried on business at Klineburgh, and the other Messrs. John N. Kline & Son, being two of the execution debtors, and Anthony Kline, who carried on their business at Vaughan Mills. In consequence of both firms becoming involved, on the 31st of October, 1851, the partners executed various deeds, transferring their property to the defendants as trustees for the benefit of creditors. The first deed was executed by Hughes and Kline, sen., and Kline, jun., and thereby they conveyed the property at Klineburgh to the defendants, upon certain trusts, and to this deed a schedule was attached of the property transferred, and various trusts declared in the deed. The deed provided for the payment in the first place of certain notes, which the trustees had indorsed for the accommodation of Hughes, Kline & Son, and then for the payment in full of the debts owing by the firm to such creditors as should sign the deed. The trustees were to be at liberty to employ the assignors in the carrying on and winding up of the business, and were to be at liberty to add to the stock and carry on the business, if necessary to wind up, for three years, in their discretion. The creditors did not release their debts, but covenanted not to sue the firm during the three years. If there should be a surplus after payment of the debts, it was to be conveyed back to the assignors. This deed was not filed under the provisions of 13 & 14 Vic. ch. 62. A second deed was executed by Kline the elder and the two sons, containing in respect of their firm, similar trust and provisions. At the time of the execution of this deed no schedule was attached to it, but afterwards a schedule was attached, in which was set forth, FIRST, the stock in their store at Vaughan Mills, and signed *John N. Kline & Sons, John N. Kline, Jun., & Anthony Kline*; SECONDLY, a list of the debts due Messrs. John N. Kline & Sons, and signed in the same manner as the first; THIRDLY, an inventory of the stock and utensils in the grist mill at Vaughan Mills, and the farm stock and produce belonging to John N. Kline, sen., and signed in a similar manner. None of these lists contained

in the schedule were signed by Kline, sen. The recital contained in the deed of what was intended to be assigned was in these words, "they, the parties of the first part, have proposed and agreed to assign all their personal estate and effects to the parties of the second part, in order to pay," &c. The operative words of the deed were these, "do by these presents bargain, sell, assign, transfer, and set over unto the said parties of the second part, and the survivor of them, his executors, administrators, and assigns, all and singular the stock in trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to, or due or owing to the said parties of the first part, and which are set forth in the schedule hereto annexed, marked with the letter A, and subscribed by the parties hereto of the first and second parts, *and all the personal estate whatsoever of the said parties of the first part, and all their estate and interest therein.*" This deed was not filed in pursuance of the statute before mentioned. By a third deed John N. Kline, sen., conveyed all his personal property to the defendants, upon the same trusts. This deed was not filed according to the provisions of the statute. By a further deed John N. Kline, sen., conveyed his real estate to the defendants, upon the same trusts.

It was proved that the sheriff seized, on the 20th of April, 1851, 2,500 saw-logs, two cutters, two horses and sets of harness, three waggons, two oxen, a cow, and a horse and buggy, and harness, on the premises occupied by John N. Kline, sen. The contest between the parties in respect of this property was, whether the trustees had assumed possession, and from thenceforth whether there was an actual and continued change of possession. The household furniture of Kline, sen., had never been taken possession of at all, nor had there ever been any inventory made or taken of it. With regard to the farm stock and implements of Kline, sen., the contest between the parties was, whether possession had ever been taken of them, and whether there had been from thenceforth an actual and continued change of possession. The evidence with regard to these was, that an agent of the trustees was sent out to obtain possession of the property

assigned, and to carry on the business ; possession was taken of the stock in trade and utensils, and implements, both at the mills at Klineberg and Vaughan Mills ; and no question was raised between the parties in respect to that portion of the property. Kline's son, it appeared, made the inventory of the firm stock, and handed it to the agent, and signed the schedule ; Kline sen., was perhaps aware of it. There appeared to have been no actual delivery of this portion of the property, and Kline, sen., remained in possession up to the time of the sheriff going to seize, as he had previously done, killing the pigs and sheep, and using them for his family, and using the other property in the same manner as he had always done. It is of no use to set forth more of the evidence than is sufficient to explain the legal questions raised, as the court were of opinion that upon the facts the verdict of the jury could not be supported, and that there should be a new trial.

Certain legal objections were made to the deeds at the trial—as 1. That the deed executed by Kline and the two sons was inoperative to pass the individual property of Kline, sen., for want of a schedule attached to the deed when executed, and no schedule yet attached shewing that he assented in any way to his individual property being transferred ; and that the words of the deed were not sufficiently large to transfer it, or at least not to be so construed without a schedule, shewing that it was intended to be transferred by him ; 2. That the schedule to the deed of Kline, sen., shews only 600 saw-logs transferred, whereas it appeared that he got out the larger quantity, and though the defendants might have paid for them, yet, remaining in his possession, they would not pass by the deed ; 3. All the deed shew that the only provisions made are for the payment of the creditors of the firm, and no provisions are made for individual debts ; 4. That the deeds were void for want of registry, according to the provisions of the statute.

Certain questions were submitted to the jury, reserving leave to the plaintiff to enter a verdict for him if the legal questions upon the deeds or any of them should be in favor of the plaintiff, and the questions so submitted were as follows:

1. Where the schedules, which are now attached to the deeds, so attached at the time of the execution by the Klines, or did they consent subsequently that the schedules should be attached, or the property mentioned therein be specified? 2. Was there any delivery by Kline, sen., of the stock upon the farm, or any possession taken by the defendants, or their agent, which was visible and continued? 3. Was Kline, sen., allowed to remain in possession, apparently using and controlling the farm and property on it, as fully as before the assignment? 4. Was there an immediate and continued and visible change of possession of the property on the premises occupied by Kline, jun., at Klineberg? The jury found the 1st, 2nd, and 4th questions in the affirmative, and the third in the negative, and consequently a verdict was entered for the defendants.

Vankoughnet, Q. C., (with whom was *A. McLean*,) obtained a rule *nisi* for leave to enter a verdict for the plaintiff, according to the understanding at *Nisi Prius*, or for a new trial on the ground that the verdict was contrary to law and evidence. They cited *Wordall v. Smith*, 1 Camp. 333; *Attorney General v. Metcalf*, 6 Ex. 40; *Barton v. Dawes*, 10 C. B. 261; *Chy. on Con.*, 4th Ed. 78; *Pannell v. Mill*, 3 C. B. 625; *Paget v. Perchard*, 1 Esp. 205; *Edwards v. Harben*, 2 T. R. 587.

A. McDonald shewed cause, and cited *Williams v. Bryant*, 5 M. & W. 440; *Yorke v. Smith*, 9 Eng. R. 345; *Jones v. Jones*, 8 M. & W. 431; *Bradford v. O'Brine*, 6 U. C. R. 417; *Dyer v. Green*, 1 Ex. 71; *Morrell v. Fisher*, 4 Ex. 591; *Rawlinson v. Clark*, 15 M. & W. 302.

BURNS, J., delivered the judgment of the court.

It is now unnecessary, since the decision in *Taylor v. Whittemore*, to consider the case further than the main point this case presents as differing from the other, and relied upon. First, it is contended on the part of the defendants that these deeds, being transfers of property for the benefit of creditors, and not being mortgages, are not within the provisions of the statutes 12 Vic. ch. 74 and 13 & 14 Vic. ch. 62. 2ndly. That the deed of Kline the elder, with the two sons, does not sufficiently transfer his property, whether

of the firm or individual, for the want of a schedule attached and because the deed only contemplates the transfer of the joint property. And the 3rd question is, as to the sufficiency of the evidence to establish an actual and continued change of possession.

With regard to the first question, it is relied upon that it is so obvious it must be known to the whole world, when one cannot meet his engagements, and when the debtor's creditors are pressing him, that any slight change or circumstance regarding the debtor's property is so notorious that there is no necessity for supposing a transfer for the benefit of the creditors was in the contemplation of the Legislature, and therefore no reason for holding such a case to be within the purview of the act. That argument, if indeed there be any weight in it, can only apply to the trading part of the community; but we must not forget that the law is general, and traders stand upon the same footing with all other portions of the community. In this case there is no taking of the debtor's property for what it may be worth, less or more, and given a release to the debtor—in which case it would resemble the case of a sale for a valuable consideration; but the goods are absolutely transferred, with a covenant not to sue for three years, during which time the property is to be converted into assets to pay the debt, and if there be a surplus the debtors will get it, but they will remain liable if there be not sufficient assets to pay the debtors. The case rather resembles that of a mortgage. But, whether it be of the one character or the other, for there can be no middle course, there is no reason why it should not be considered as coming within the terms of the statutes. Whether the case be that of a sale or mortgage, it is no answer to say that because it is clogged with trusts of one description peculiarly differing from another description, therefore it is a case not within the statutes. In construing the operation of the law with respect to these instruments, the trusts upon which the transfer of property may be made, whether it be a sale or mortgage, form no ingredients in interpreting what the Legislature meant. The words of the statutes are too plain

to admit of any doubt that the present case comes within the operation of a sale or mortgage, and will require registration, as in any other ordinary case.

As to the second question—It depends upon the fact, whether the schedule which was intended to be annexed forms part of the deed, so as to be incorporated with it, either for the purpose of rendering certain what otherwise would be uncertain, or where the effect of the deed is to be a limitation to what may be contained in the schedule. In this case the schedule is not necessary to be looked at for either of the purposes; because, although the deed professes to convey all which may be contained in the schedule, yet the operation of the conveyance is not confined to that; but there is a further conveyance, of *all the personal estate whatsoever of the said parties, and all their estate and interest therein*. These words certainly do not confine the transfer to the joint property which the parties would be possessed of, but are comprehensive enough to embrace the individual property. In a case where general words similar to these were used, but where the assignment was made by one individual—*Ringer v. Cann*, (3 M. & W. 343)—Lord Abinger says: “I think the distinction in all these cases is, whether the object of the parties was to pass a limited interest or not.” When the parties said they conveyed all their personal property whatsoever, and when we see the object was to satisfy creditors, with a resulting trust to the debtors; and as the term “personal property whatsoever,” must embrace property held individually as well as jointly, we are absolutely justified in construing them in the widest sense. It may be said the fact of John N. Kline, jun., conveying his property individually by separate deed, rather furnishes evidence that the parties may have supposed it would not pass by the joint deed; but when we turn to the terms of that separate deed it rather furnishes evidence the other way, for it is more in the nature of a confirmation than a substituted conveyance. It recites that Kline, son., carried on business at the saw mill at Klineberg on his own account, and separate from the rest of the business; and then the deed, after

reciting other deeds and trusts therein contained, goes on to say that it transfers *all his personal property of whatsoever kind that he may possess and be interested in, and which may not be considered to pass by the deeds or assignments already mentioned.*

As respects the third question, that must turn upon the evidence in connection with the construction to be put upon the two statutes already referred to. Undoubtedly the legislature intended that in future title to personal property capable of delivery from hand to hand, should no longer depend upon a symbolical delivery and possession, and then afterwards to allow the transferror to remain in possession, unless the evidence of the title of the transferror was so placed that everybody might know of it. Therefore unless an actual change of possession takes place, and there remains a continued change of possession, the conveyance must be filed as the acts direct. A change of possession, and afterwards the transferee re-delivered again to the debtor as the *agent* of the creditor, though his being agent accords with the deed, is after all nothing but equivalent to a symbolical delivery, and leaving the goods just where they were before; and this, we think, the Legislature did not mean should any longer be the case without registration of the title. Now, applying this position to the evidence given, we find in the case of Kline, the younger and as respects the property seized, that he was in the possession just as he had always been, and was managing it, as it is said, for the defendants. The agent of the defendants was not in possession any way, further than that the property had been delivered and left with the debtor. Of course the agent could have gone at any time and deprived the debtor of it. It was attempted to get over this difficulty by shewing that the defendant's agent was then looking after the property, but it is apparent that he was engaged in looking after the property which was contained in the store and mill, and managing it, and that while at Kline's house he was only there as his guest, and not there as the master of the house or the property. Then when we look at the case of Kline, sen., we find that no delivery of the

furniture in the house ever took place; and it is not pretended that it was delivered, unless the delivery of the stock on the farm, such as that delivery was, might be construed to be as if in the name of the whole. As to this stock: Suppose that it were satisfactorily made out there had been a delivery of it, yet it is quite plain from the evidence there was no change of possession whatever, and there could be nothing but a symbolical delivery of it. Kline used it in working the farm—used it for the use of the family, and dealt with it as his own, and not as an agent even for the defendant. With respect to this portion of the property, it was said that the defendants' agent lived at Kline's house for a period of nine months, and was attending to the business of the shop, the goods in which, and the property in the mills the defendants did have possession of; and that he, Kline, was perfectly well aware of the nature of the business of the agent; and it should be considered that he was acting, in regard to the household furniture and farm stock, in the same character and capacity, and with the same authority as in respect of the store and mill. The agent, however, did not appear to be the master, exercising authority, and that the other was his servant or in his employment; but, on the contrary, the agent seems to have remained in the house as Kline's guest. We do not mean to say that it may not be perfectly legal that the former proprietor may be employed to take care of property assigned, and that he may not be jointly in possession with the transferee or his agent, for the purposes of the trust; but if he be in a case in which the conveyance has not been filed as directed, then his position should be clear, distinct, and unequivocal. In the present case it is quite clear that Kline's position was not equivocal; but that position is on the wrong side of the question for the validity of the transaction, as far as the defendants are concerned, in respect of farming stock and household furniture.

The verdict cannot therefore be supported; and, as we are of opinion the deed cannot be questioned except upon the point of the change of possession, and as that point was

not reserved but left to the jury, we cannot direct a verdict to be entered for the plaintiff, but must grant a new trial without costs.

Vide Dyer v. Green, 1 Ex. 71; Wood v. Rowcliffe, 6 Ex. 407.

Rule accordingly.

REGINA V. SAUNDERS.

Bank bills—Goods and chattels—Surplussage.

An indictment charging the prisoner with stealing bank bills "of the moneys, goods, and chattels of one T. B." was held good, as the words "of the moneys, goods, and chattels" might be rejected as a surplussage.

The defendant was found guilty at the Recorder's Court for the City of Toronto, upon an indictment for stealing bank bills, which were described in the indictment as being "*of the moneys, goods, and chattels of one T. B.*" Skelton moved to arrest the judgment, on the ground that the bills should have been alleged to be of the *property* of the said T. B.

ROBINSON, C. J., delivered the judgment of the court.

Unless notes are *goods and chattels*, they do not come under the act 8 Anne, ch. 31; but as stealing bank notes is expressly made larceny, their legal character as chattels or otherwise is not in question, because stealing them *eo nomine* is made felony (a). It is necessary to state them to have belonged to some person, and though none of the words used may be technically correct—"moneys, goods, or chattels,"—yet these may all be rejected as surplussage, and then we have the charge of stealing *bank notes* of one T. B.—*i. e.*, of, or belonging to, or in the sense of belonging to. The case of Regina v. Bradley (2 Car. & Kir. 974, 13 Jur. 544), shews that it was right enough to charge the larceny as in this case, and we must therefore hold the indictment sufficient.

Conviction affirmed.

(a) See 4 & 5 Vic. ch. 25, sec. 5.

PURDY V. FARLEY, AND REGINA V. PURDY.

Alteration of road—Circumstances necessary to authorize conveyance of old allowance by surveyor—50 Geo. III. ch. 1, 4 Geo. IV., sec. 2, ch 10.

In 1812 a report was made by J. M., surveyor of highways, reciting an application of twelve freeholders, as required by 59 Geo. III. ch. 1, and stating that he had "examined the situation of the land for a new road in township of S., leading from lot No. 16 in the third concession across lots Nos. 17 and 18 in the said third concession until it intersects the forty feet road between 18 and 19; then following the forty feet road until it intersects the lane in front of T. A's house; then across the different lots in the third concession aforesaid, until the said new road intersects the forty feet road between Nos. 30 and 31." This report was afterwards allowed by the quarter sessions, as appeared by a minute endorsed on the report, and signed by the chairman. P., the owner of lot 29, went before the sessions to oppose the change in the road, but withdrew his opposition on being told that he would get the old allowance in the lieu of the ground taken from him by the new road. No conveyance was made till 1831, when the surveyor of highways, for that year, executed a deed to P. for the old allowance, which deed was expressed to be made under the authority of 50 Geo. III. chap. 1.

F. (the owner of the adjoining lot in the second concession) having thrown the fences erected by P. to enclose the old allowance, was sued by him in trespass, and justified on the ground that the *locus in quo* was a common highway. F. then procured P. to be indicted for obstructing a highway, being the same road allowance.

Held, that the conviction could not be supported, for it was not shewn that any order had been made, or notice given, as required by 9 Vic. ch. 8.

Held, also, (Robinson, C. J. *dissentiente*) that there was not sufficient in the report, or the evidence given, to authorize the surveyor to convey as it did not appear that the old allowance had become unnecessary for a public highway:—and that the action of trespass could therefore not be maintained.

Semle: That it should also have been stated that the old road was one *then in use*, for that the surveyor has authority under the statute only to convey land over which there was an actual highway.

These cases brought up the same questions, on the same facts, and in effect between the same parties. In the civil action Purdy sued Farley in trespass, for entering on his close a few months before this action was brought, and pulling down his fences. He described the close by metes and bounds, and it was not disputed that the *locus in quo*, as described, was part of the concession line between the second and third concessions of the township of Sidney, laid down in the original survey, being that part of the original public allowance for road or concession line which was in front of the plaintiff's lot No. 29, in the third concession. Farley's defence was that the *locus in quo* was not the plaintiff's close, but was and is a common and public

highway, and there were proper pleas on the record for bringing up that question.

After the defendant had pulled down the fence erected across this original concession line, which was the trespass complained of, the defendant put it up again, and the defendant for that act procured Purdy to be indicted for a nuisance, in obstructing a common and public highway. Purdy pleaded not guilty to this indictment, and contended upon his trial that the *locus in quo* was not then a public highway, although it did form part of the original concession line, for that it had ceased to be a highway, and became his private property under the provisions of a public statute.

Both cases were tried before Robinson, C. J., at Belleville. The civil case was tried first; the evidence appeared to the learned Chief Justice to be such as entitled the plaintiff to succeed; and upon a direction given to that effect the jury found a verdict for him with a shilling damages—the action being brought merely to try the right.

Richards, for the defendant, moved for a new trial on the law and evidence, and for misdirection, and the rejection of legal evidence; and on affidavits stating the discovery of new evidence. He cited *Rex v. Sanderson*, 3 O. S. 103.

Wallbridge shewed cause, and cited *Rex v. Morris*, 4 T. R. 550.

On the trial of Purdy for nuisance, the evidence was to the same effect as in the civil action. A verdict of "guilty" was rendered—the case being reserved for the opinion of the court; and it was argued at the same time as the civil case.

The facts are fully stated in the judgment of the Chief Justice.

ROBINSON, C. J.—The defendant (Purdy) became the proprietor of lot No. 29, in the third concession of Sidney, on the 9th of October, 1810, by purchase from his father, who was grantee of the crown. The concessions in Sidney number from the Bay of Quinte northerly; the lots in each concession are numbered from east to west.

In 1811 (12th of November), upon a petition which had

been presented by twelve freeholders to the justices of the Midland District, in General Quarter Sessions, agreeably to the statute 50 Geo. III. ch. 1, which petition was not given in evidence on the trial, a report was made by John McIntosh, surveyor of highways, to the justices in sessions, reciting the application, and reporting that he had "examined the situation of the land for a new road in the township of Sidney, leading from lot No. 16 in the third concession across lots Nos. 17 & 18 in the said third concession, until it intersects the forty feet road between 18 & 19, then following the forty feet road until it intersects the lane in front of Joseph Aikins's house; then across the different lots in the third concession aforesaid until the said new road intersects the forty feet road between numbers 30 & 31." On the 28th of January, 1812, this was approved of by the justices, as appeared by a minute to that effect, indorsed on the report, and signed by the chairman of the quarter sessions.

It will be perceived that the road thus authorized is called in the report a new road, and that its exact course is not defined in the report, nor its breadth. Leaving the third concession line at Lot No. 16, and keeping as far northerly as was necessary for avoiding a swamp, which is upon the concession line at that point, it had been in fact so laid out as to run westerly across the lots till it intersected the nearest side road running back from the concession, and then it followed that side line up northerly till it reached the lane mentioned in the report, and continued westerly, keeping back about 100 rods from the concession line, until it came within a mile or nearly so from the river Trent, when it ran down again into the third concession line.

The first point made in the case by Farley, who owned Lot No. 29, in the second concession, opposite to Purdy, is, that this is a *new* road and not an alteration of the concession road, and that we must so regard it, because the surveyor's report describes it as a new road and does not express it to be an alteration of any other road. Then this being, as he contends, a new road,—by which he means an additional road and not a substitution for any

other road previously laid out by public authority, he says that the statute 50 Geo. III. ch. 1, sec. 9, does not apply to it so as to authorize the concession line to be sold, or to give the owners of any of the lots through which this road passes a right to claim a conveyance of the respective portions of the concession line in front of their lots in lieu of it, as directed by the statute 50 Geo. III. ch. 1.

The provision referred to is made by the 9th clause of the statute 50 Geo. III. ch. 1, and is this, "that in all cases when it shall be found necessary to alter the direction of any such highway or road already laid out, so that the land through which it formerly passed shall become unnecessary for a public highway, in such a case it shall be lawful for any surveyor or surveyors to be appointed under and by virtue of this act, and he or they are hereby fully authorized and required to sell such land, and to grant the same under his hand and seal, or their hands and seals, to any purchaser, which sale and grant shall convey title to such purchaser; *provided nevertheless*, that if the owner or owners of the land through which *such new road* may pass shall be willing to *accept the old road* as a compensation, such owner or owners shall and may take the same by a conveyance under the hand and seal of the surveyor or surveyors as aforesaid, which is hereby fully authorized to give." In the case of the old road being sold under the first part of this clause, the money received for it is directed by a subsequent clause of the act to be paid to the owner of the lot through which the new road has been laid out.

The language of this clause, I think, no less than the reason of the thing, shews the present to have been a case in which Purdy, as the owner of the lot 29 in the third concession, through which the road in question was in 1811 laid out by the surveyor of highways, was entitled to demand, if he pleased, a conveyance of the old road. By the 12th clause of the act it is enacted that "all allowances for roads made by the King's surveyors in any township already laid out shall be deemed common and public highways *unless any such roads shall have been already altered according to*

law, or until such road or roads shall be altered according to the provisions of this act."

It is clear, no doubt, that if the road laid out in 1812 had been a new road, in the sense that it was an additional road for connecting two points that were not before connected by any highway leading from one to the other, and not a substitute for or an alteration of any other line of the road, which in that part of its course was intended to be abandoned, then the 9th clause could not apply to it, and Purdy would have had no claim to have any land conveyed to him, for there would in that case have been no old abandoned line of road to be sold or to be given in compensation. For instance, if the concession lines at each end of Purdy's lot, being not unfavorable for a road, had been opened and used as a highway according to the intention in respect to all concession lines, it might still have been deemed necessary in consequence of the proximity of a village, if the township was populous, or for some other reason, to lay out an additional road across the lots in that vicinity without interfering with the original travelled allowances for road, and not intended as a substitute for either of them; and in that case there would be no old road which the surveyor would have been authorized to convey to the owners of the lot or lots as a compensation for the road laid out through their lands.

But we cannot, I think, upon the evidence received, look upon this case as one of that kind. It is clear from the testimony of the witnesses examined that the third concession line was deviated from at lot 16, not because a third or additional road was wanted between the two concession lines in this part of the township more than in others, but because the original allowance laid out in the survey was on wet and swampy land. It was this occasioned the deviation, in order to get upon dry and hard ground; for at that early period, when the population was small, it was not easy to overcome natural obstacles of that kind, and it was found a less inconvenience to deviate from the right line than to make an artificial road through a difficult tract. The proof that it was an alteration of the

original line, and a deviation from and substitution for it, although not so called in the report, is that the original line was not opened or used, but left in a state of nature, and the new line was adopted in its stead. Great stress was laid in the argument on the surveyor having called this in his report a new road; and it was insisted that this must inevitably mean a *new* road in the sense of an additional road, and cannot be admitted to be the alteration of another road; but this is an argument which seems to me rather ingenious than solid. If we were to give way to it we must see that it would have the effect of establishing a conclusion contrary to the fact. There is nothing in the original sense of the word to impose such a necessity upon us; for we cannot but know that in all cases where a deviation from an old line of road has been made either to shorten distance or for any other cause, it is common to speak of the changed line as a new road, by which is meant a road newly opened and made, or newly laid out; in truth such a road is, correctly speaking, a new road; and what is above all conclusive on this point is that in this statute itself the term "new road" is clearly so applied; as, for instance, in the ninth clause, where it is provided that if the owner of the land through which such *new road* may pass, shall be willing to accept the old road as a compensation, he may take the same by a conveyance from the surveyor of highways; which in truth is just this case. And the tenth clause also shews as plainly that the Legislature, when they speak of a new road, do not always mean an additional road, but use the term both in reference to any road newly laid out and to an alteration of a previous road. We cannot, after seeing this, venture to hold that because the surveyor in his report has called the road laid out by him a new road, he must be understood, however contrary to the fact, to have been speaking of an additional road not intended as a deviation from or alteration of any other road.

Then the 12th clause, which I have cited, makes it clear that in this case the public allowance for road laid out in front of Purdy's lot in the original survey having been thus

deviated from and altered, is no longer to be deemed a common and public highway, which would show the criminal prosecution not to be sustainable, for there has been no highway established in this part by dedication or user. It could not become such, I think, by any pathmaster taking upon himself afterwards to open it, or being directed to open it by the justices, or now by the municipal council; but can only be restored to its character of a highway by a regular proceeding to be adopted for that purpose according to law, in which case Purdy would have a claim to be remunerated.

It has the appearance of being an equitable provision, which was made by the 9th clause of the statute 50 Geo. III—that the proprietor of the land through which the new road is laid out is in such cases to have the old allowance as a compensation, but it was obviously an arrangement, most inconvenient in its effects, for by his taking in the old allowance and enclosing it with his adjacent land, he deprived the owner of the lots on the opposite side of the concession line of the means of getting into the new line of road without trespassing on private property, unless where there happened to be a side line between lots which would cross the altered road, and this we know in general occurs only at intervals of a mile or more. It was probably the knowledge of this inconvenience that led the legislature some years afterwards to make the alteration in this respect by the statute 4 Geo. IV. sess. 2 (1824), ch. 10. sec. 7, which gives rise to another question in this case. That clause is as follows:—“And whereas much inconvenience has arisen from the sale of portions of the original government appropriations and allowances for highways and roads in the several townships in this province, be it therefore enacted, &c., that the ninth clause of the act passed in the fiftieth year of his late Majesty’s reign, intituled, &c., be and the same is hereby repealed, so far as regards the aforesaid government appropriations for such highways and roads: *provided always* that nothing in this clause contained shall restrain any surveyor of highways from selling and conveying any road which he is now by law authorized to sell and convey.”

It was proved that when the surveyor's report upon the petition of the freeholders was before the sessions in 1812, Purdy, who then owned lot 29, went forward to oppose the change in the road, but was prevailed on to relinquish his opposition, on being assured that the old road, or rather the allowance for road in front of his lot, would be conveyed to him in compensation for the land taken from him for the new road. He applied to one McIntosh, who was surveyor of highways at that time, for a deed, but some delay occurred; the war of 1812 with the United States took place very soon afterwards; McIntosh was called away on militia duty, and was drowned. Purdy applied to the succeeding surveyor of highways, Canniffe, but he said he did not know what kind of conveyance he was to make. The act of 1810 had been but a short time in operation, and it is probable the district officers had not yet become familiar with its provisions. Purdy, however, it would seem, must have greatly neglected the matter himself, for it was not till the 10th of May, 1831, that he at last obtained a deed from Gideon Turner, the surveyor of highways for that year.

There was no attempt to throw any discredit upon this conveyance, as having been executed otherwise than in perfect good faith, and in pursuance of what the surveyor conceived to be his duty. Mr. Turner was present at the trial, being a member of the grand jury, but he was not called, the execution of the deed being admitted. This conveyance purports to be made by virtue of the authority vested in Mr. Turner, as surveyor of highways, under statute 50 Geo. III. ch. 1, and it grants the land under a particular description, as being "60 feet wide, and in front of lot 29, in the third concession of Sidney, being the allowance for road in rear of the second concession of the said township—in compensation for a road laid out by John McIntosh, a road surveyor for the county of Hastings, and approved of by the sessions, through the land of the said Purdy, he being willing to accept the same in compensation for the said new road so laid out and confirmed."

It was proved that in 1812, when the report was con-

firmed, the old allowance for road was uncleared; that Purdy soon after made sugar upon it; and in 1819 or 1820 one Smith, whose father then owned the opposite lot, 29, in the second concession, cleared part of this allowance. His father afterwards sold his lot, which came into the possession of Farley by purchase, about 1828 or 1829, and he, continuing to hold the possession which Smith had taken of this small piece of land, was sued in an action of trespass by Purdy, who claimed the land as his. They went together to the office of the clerk of the peace in consequence, and upon Farley's seeing there the report and order of the justices for laying out the new road in 1812, he compromised the suit, paying the costs, and moving the fence back forty feet, supposing that to be the width of this road, as it is in many of the old surveys in the Midland district. Farley did not resume possession. Purdy afterwards cleared the whole of the road allowance, and having fenced it in latterly, the fences were repeatedly thrown down, but Purdy could not ascertain by whom, till at length the defendant admitted that he had done it on this last occasion, in 1851.

By the statute 33 Geo. III. ch. 4, it was enacted that concession roads should in no case be less than 60 feet wide, and by statute 50 Geo. III. ch. 1, the same provision was continued; and as to all roads to be laid out by surveyors under the authority of that act, they were not to be less than 30 nor more than 60 feet, in the discretion of the surveyor laying them out; provided that the roads in front and between every concession were in no case to be less than 60 feet, except in such townships where the allowance for road by government should be less than sixty feet. By statute 4 Geo. IV. sess. 2, ch. 10, sections 2 & 3, and by subsequent acts, different provisions have been made respecting the width of roads to be newly laid out, but these do not affect any roads that had been already laid out under the statute 50 Geo. III. ch. 1. The third clause of 4 Geo. IV. provides that it shall not be lawful for the surveyor of roads reporting any alteration to lay out such new road of a less width than the one proposed to be altered.

In the civil action it was objected at the trial by the defendant's counsel, after the plaintiff's case was closed, 1st. That before the new road could be held to be legally established so as to entitle Purdy to the old allowance, it was necessary that the justices, under the statute 50 Geo. III. ch. 1, section 3, should have made an order directing the road newly surveyed to be opened.

2ndly. That under the statute it was only the surveyor of highways who had laid out the new road that had legal authority to make a conveyance of the old allowance.

I overruled both of these objections. The defendant's counsel offered to prove that in 1837, certain commissioners of highways had given orders to have the old allowance (3rd concession line) opened. I rejected such evidence. It was not shewn that these road commissioners spoken of were any others than the commissioners authorized to expend the public moneys granted by parliament in that year for improving roads, and the defendant's counsel admitted that he could produce no authority given to such commissioners by any statute for restoring old allowances for roads that had been changed and abandoned. It was asserted by the learned counsel also, that in 1819 or 1820, the justices in special sessions had ordered this old road to be opened. I would have received any evidence of such an order the defendant was prepared to give, but none was shewn.

I told the jury in the civil action that, taking the two statutes together,—50 Geo. III. ch. 1, sec. 9, and 4 Geo. IV. sess. 2, ch. 10, sec. 7,—I considered that the plaintiff had a right to call for the conveyance which was made to him, though the long delay which had taken place before it was obtained was very much out of the common course. I held that the 7th section of 4 Geo. IV. ch. 10, which restrains the surveyors from making deeds of the old allowances in such cases, only applied to alterations which should be made afterwards, and did not take away the right which the plaintiff Purdy had already acquired to call for a deed in consequence of the substituted road being laid out through his land in 1812. Upon this charge they found for the plaintiff.

On the trial of the indictment against Purdy for nuisance Farley was examined as a witness, and swore that Purdy's possession of the old allowance had not been uniformly acquiesced in, for that about fifteen years ago part of it had been opened by a pathmaster. He swore also that the concession line in that part of it which is opposite to lot 29 is good land for a road, better than the now travelled line, and that it continues so from thence eastward to lot 19: that he once went to the clerk of the peace to inquire about this matter, and was told that the new road was laid out under the act, but that the old line had not been condemned.

It was sworn, on the other hand, by a respectable witness on this trial, that the third concession line, as originally laid out, runs through a swamp from lot 18 for three miles westerly; that a good road could not even now be made there; that it has never been travelled; that the new line laid out in 1811 and confirmed in 1812, was substituted for the old allowance, and was so intended, being taken around the swamp north of it, upon the dry land.

I directed the jury in this case that the evidence appeared to me to shew a road laid out across Purdy's lot, in lieu of the old concession line, under the act 50 Geo. III. ch. 1, and not a purely new or additional road; that the deed which was given to him in 1831, by the surveyor of highways passed the land to him, notwithstanding the change made in this respect by the 4 Geo. IV. ch. 10, sec. 7, because that was only prospective. I told them, further, that under the facts proved, I consider that the government allowance at the time of the alleged obstruction by the defendant could not be looked upon as a public highway; that it had never been in fact opened and travelled, and had ceased, under the 12th clause of the 50 Geo. III. chap. 1, to have the legal character of a highway after the alteration sanctioned by the quarter sessions in 1812.

After the further consideration which I have given to this case, I retain the opinion I expressed at the trial.

The 35th clause of the statute 50 Geo. III. chap. 1, made the new road, laid out in 1812, through Purdy's land, the

soil and freehold of his Majesty. It would have been very unjust, and was never intended by the Legislature, as all their acts shew, that land which a private person had purchased should be taken from him without his consent and without making him compensation. In 1812, when the alteration was made (for it was clearly an altered road, an not a new or additional road), the owner had the option to accept the old line which had been abandoned for that which had been taken from him. It is not pretended that he ever received any compensation in money ; and so long as the circumstances remained unaltered, I see nothing that would authorize us to say that he was bound to make his election within any limited time. All that the 9th clause of the statute says is, that when the old or original line shall have become unnecessary for a public highway, in consequence of an alteration made under that act, it shall be lawful for any surveyor of highways *to be appointed under the act* to sell the old allowance, or convey it to the owner of the land through which the new road shall pass, if he chooses to accept it.

As to there having been no order made for opening the new road, it is possible that the written confirmation of the new line, indorsed on the report and signed by the chairman of the quarter sessions, may have been the only written order or direction made upon the subject ; but because no formal order was produced at this distance of time, forty years, it is not to be presumed that no such order was made. The road through Purdy's land had been in fact made and used, and enjoyed by the public ever since, and it is used to this day. The public have it irrevocably ; and in my opinion Purdy is not to be told that he has no claim to the old road, because his land which is now used instead of it was taken from him by the public irregularly. The public cannot gain by their own wrongful act any more than an individual can, which they would be doing if they could be allowed to claim a right of way in the old road, because they had obtained the altered line irregularly. So long as Purdy has acquiesced in the alteration, and waived any ground on which he might have disputed the establishment

of the road through his hand (if there were any irregularity), no one can take advantage of it; the right of the public in the substituted line is secure.

The counsel for Farley, or rather for the crown, in the criminal prosecution against Purdy, referred us to the case in this court of *Rex v. Sanderson* (3 O. S. 103), and argued from that case that the road laid out through Purdy's land, and indeed that the new line of road generally, is so vaguely defined in the surveyor's report confirmed in 1812, that no road can be held to have been legally established under that report, and that it must therefore follow that Purdy is not entitled to the old line in compensation.

In *Rex v. Sanderson* it was the owner of the land through which a new road had been ordered to be laid out by a proceeding that had taken place a few years before, that contended against the legality of the order on various grounds, as well as against the sufficiency of the report in regard to the description of the line of road. He insisted upon keeping his own land till it should be legally taken from him; and he was indicted for nuisance in inclosing the road, he was entitled to contend that a public right of way had not been legally established over his freehold; and the court sustained several of the objections which he urged—such as want of notice, insufficient definition of the road, and other exceptions.

Here, in consequence of what the public authorities did, not lately, but forty years ago, Purdy, the defendant in the indictment, has lost his land, and the public have gained the road, for he has acquiesced in that road being taken, used, and enjoyed, which was in fact laid out in lieu of the old road. It is no longer now an unascertained point where the new road is to run, for it has been laid out and enjoyed from the year 1812, and we should assume a proper order to have been given to the surveyor, since the defendant has acquiesced in it. The new road, I think, must in the absence of anything to the contrary, be assumed to be of the same width as the concession line from which it deviates, and which on the east or west still forms part of it. The statute provided that it should not be of less width.

There is nothing in the affidavit which has been filed on Farley's part upon which we could grant a new trial, and my opinion is, that in the criminal case the defendant ought not to have been convicted, and that the rule for a new trial in the action of trespass should be discharged.

It may be that in this case Farley may be able to convince the proper authorities that, notwithstanding the alteration of the road in 1812, by carrying it around the swamp (which was rendered necessary by the nature of the ground above and below him in the concession line, although the soil immediately in front of this lot may have been more favorable,) it would yet be convenient to the public that the concession line as originally laid out should be restored to its legal character as a highway, and should be opened and used by the public. In that case, however, the municipal council, which should authorize it, would have to take care that Purdy should be duly compensated for it, otherwise he would have no remuneration for the land which was taken from him in 1812, and which the public now enjoys as a road.

This is only my own view of these cases. My brothers, I think, have come to a different conclusion, and I will on that account revert shortly to the ground on which my opinion is formed.

The mere delay in taking the conveyance, though it was great, does not seem to me to create any difficulty. There is nothing in the statute that would authorize us to hold that no surveyor of highways but the one who made the report was competent to convey the land. To have required that would have been subjecting such proceedings to a very unnecessary inconvenience, for the surveyor might die before the matter could be concluded. If there had been no other question in this case, and all had been in the most regular and ordinary form, I do not see anything that would have authorized us to hold that the surveyor for the time being could not have sold the old road in 1831, if it had not been sold before, as well as in 1812; and as to the delay of Purdy in making his election, he did, according to the evidence, declare his election to have the

land in 1812. Upon general principles he could make his election at any time during his life, where there was nothing in the nature of the particular case to limit him to a certain time. The road was not required in such cases to be sold within the first year, or within five years, or ten. I am not able to find any time when we could say it would be too late ; and when it would not be too late to sell the road to a stranger, the proprietor of the adjacent lot must be in time to step in and take the land instead of the money, if he prefers it.

Then, as to the right otherwise to demand a conveyance of the road, that depends on whether the surveyor would have been at liberty to sell it. I do not think that we can hold there was no such right, merely because the surveyor in his report of the new line surveyed on the request of the freeholders did not express that the line was an alteration of the public allowance, and that the allowance was unsuitable for a road. He says nothing to the contrary. His calling it a *new* road is not inconsistent with its being an alteration, as the meaning given to the words "new road" in the statute itself very clearly shows. I do not see that we can properly exclude evidence of what the fact was from other sources, where that evidence does not contradict the record ; and it is self-evident, I think, that the road laid out was an alteration of the previous allowance, and in place of the concession line. The fact that it left the concession line where the swamp commenced, and kept back until the whole swamp was passed, shews this plainly ; and added to this are the facts that from 1812, to this time the concession line has never been opened or made use of as a highway, and that the proper officer has nearly twenty years ago conveyed it to Purdy, who has never from that time been disturbed in the possession of it except by Farley. This appears to me to be conclusive.

What may happen to be the nature of the soil opposite the particular lot 29, is not the question. The object was to get a better line than the concession line afforded in the main ; and it was not to be supposed that in this case, more than in others, the surveyor, when he found it expedient to

abandon the concession line, would return to it whenever he could find a dry spot, though he might have to depart from it again after keeping along it for a few yards. That would make the road a most inconvenient zig-zag line, and would absurdly increase the distance.

Then as to the report not describing the road, as undoubtedly it ought to have done, giving its courses and its width—that would be very material, if as in Sanderson's case which has been cited, Purdy was struggling to keep the public out of his farm, and was contending against the new road as not being legally established. But after forty years' enjoyment by the public of the new road, the line has become irrevocably fixed and is secure to the public, and this, I think, entitles Purdy under the act to compensation in such a case, either by receiving the proceeds of the sale of the old road, or, if he prefer it, a conveyance of the soil; and entitled him equally to receive the conveyance in 1831, after the public had used the new road through his farm for nineteen years.

The statute 9 Vic. ch. 8 was not referred to in the argument, and escaped attention at the trial of these cases. This is intituled "An act to prevent the opening of government allowances for roads, without an order from the district counsel of the district in which the said allowances are situate." It recites that in consequence of roads established by law *parallel* or near to government allowances for roads, *and in lieu thereof*, the said allowances for roads have for years remained closed *and in possession of private persons*; and that great inconveniences may arise in consequence of the said allowances being thrown open without *due notice thereof* being given; and it enacts that no allowance for road shall be opened, unless an order ordering the same to be opened shall be first made by the district council; and that no such order shall be made unless a notice in writing of the intended application shall have been given *to the party in possession of such allowance for road* eight days before the meeting of the council. It is impossible, in my opinion, that, in the face of this statute, the criminal prosecution can be sustained against Purdy. A

road which had not been laid down in the original survey of Sidney, was, as this statute says, established in this case by law over the lands of Purdy, a private proprietor. It was "parallel to the government allowance," though, as in every other similar case of departure, it is not literally parallel in its whole extent, for that would be impossible, since it must form an angle with the allowance, where it leaves it and where it returns to it. This was also, in my judgment, clearly shewn to be a road "in lieu of the government allowance;" and it is certain that in consequence of this new road being established by law in 1812, the government allowance has for years remained *closed and in the possession of Purdy*. These are facts which cannot be denied, and they bring this case precisely within this statute, and shew that a person in the situation in which Purdy is, was intended by the legislature to be protected by this act in the possession of the allowance, even if he had taken it upon himself to inclose it and occupy it, without its having been conveyed to him; for which respect to allowances abandoned since the passing of 4 Geo. IV. sess. 2, ch. 10, there could have been no such conveyance. It would be wholly repugnant to this statute to hold Purdy, upon the evidence given in this case, liable to a conviction for nuisance to a highway for keeping possession of the government allowance opposite to his land since the passing of this act, and before any order has been made by the district council for opening it; and equally repugnant, I think, to hold that any one is at liberty to pull down his fences under the pretence that they are obstructing a highway. The plaintiff was possessed of the close, and had been for a long time, and under the evidence it was not in contemplation of law a common public highway, and will not be so till the council shall determine to open and use it.

DRAPER, J.—I have the misfortune to differ from the opinion just expressed as to the decision of the rule in the civil action. The *locus in quo* is made by the 10th sec. of 50 Geo. III., a common and public highway, and the question is, whether under that statute, and by the report of

the surveyor of highways, of the 12th of November, 1812, and the confirmation of that report by the justice in January, 1812, and the conveyance by the surveyor of highways of the 10th of May, 1831, it lost that character, and became the individual property of the plaintiff in the civil action, discharged from the public right.

The documentary evidence, taken alone, would be, as appears to me, quite insufficient to authorize the surveyor to sell and convey the original road allowance. We have nothing before us but the surveyor's report, and its confirmation. We are not informed either by the report reciting the application of the twelve freeholders, or by the production of that document—that they stated that the public highway was inconvenient and might be altered. The presumption, I think, is that the application did not so state—first, because that statement seems by the statute applicable only to the case of a public highway in use at the time of the application, respecting which the allegation of inconvenience and possible alteration could be made; and secondly, because the surveyor's report does not allude to any such allegation, but leads much more clearly to the conclusion that the application was based upon the other alternative in the act; viz., "*that it is necessary to open a new highway.*"

Conceding for a moment that parol evidence was admissible to supply this want of certainty on the documentary evidence, which the statute requires to be kept "as a record and description" of the highway, I do not see sufficient in the evidence that was given to have the required effect. The plaintiff, in the civil action, swore that "he went down in 1812 to oppose the change, and was told that if he would not he should have the old road, and he agreed to accept of it." Who told the plaintiff this, or to whom he signified his agreement to accept, is not stated, except that on the trial of the indictment a witness swore that "Pardy at first opposed the new road before the Quarter Sessions, but the witness persuaded him to agree to it, on the road surveyor agreeing to convey the old allowance to him." If this be all, and it is all that was in evidence, it fails to convince me

that the statute was complied with, so as to empower the surveyor to convey. First, as to the opposition, if it were duly made (and I shall not raise the question whether there was notice of opposition to the surveyor of highways), it could only have been disposed of by a jury, which in the event of opposition the justices of the peace are required to empanel. If not made, then the case rests upon the report confirmed as unopposed, and the report so confirmed is a record that there was no opposition, otherwise the law has not been obeyed, and the confirmation of the new road would be in contravention of the law, and cannot be the foundation of the plaintiff's right to the original allowance.

So far as I see there is nothing but the report and confirmation by the justices, and the parol evidence of the unfitness of the land over which the original allowance was laid out, together with evidence of intended opposition and withdrawal. As to this latter, it seems to me to amount to nothing; and, as to the unfitness of the original allowance for a road, that is not made by the statute the criterion on which the conveyance of the surveyor is to depend. The statute says, "when it shall be found necessary to alter the direction of any such highway or road *already laid out*, so that the land through which it formerly passed shall become *unnecessary* for a public highway," then the surveyor may convey. Coupling the expression here used as to altering a "*highway already laid out*" and "the land through which it previously passed," with the language of the 3rd section, as to the application stating that any highway "*now in use* is inconvenient and may be altered," it may well suggest the question whether the surveyor could convey any highway not in use—*i. e.*, any land over which there was not an actual highway, though inconvenient and requiring alteration; but, however this may be, it is free from doubt that he can only convey land which, by reason of the alteration of the direction of the highway, has become unnecessary for a public highway. Now the parol evidence appears to me to fall very short of establishing this, or of shewing that such a question was even raised. This new road extends from lot No. 16

to the forty feet or side line road between lots Nos. 30 & 31, crossing fifteen lots, the owners of which would seem to have an equal right with the plaintiff to a conveyance of the original allowance in front of their respective lots. But though there was evidence of the general unfitness of the concession line throughout for a highway, it was by no means uncontradicted. The part for trespass whereto the plaintiff brings his action has been cleared, fenced, and cultivated; and on the trial of the indictment one of the defendants in the civil action swore, that on No. 29 the old allowance is the best line for a road, and continues good for a road to No. 19, or two-thirds of the whole distance; and the statute does not rest it upon the question of *unfitness*, but of the old road having become *unnecessary*. This question ought, as appears to me, to have been determined at the outset. It should appear in the report founded on this application calling on the surveyor to report on that, in connection with the other subject. This is more than a mere matter of form, for the owners of all land adjoining the road allowance which it is proposed to declare unnecessary, and to convey away as such, have a particular interest; and the public notice required to be given by the statute, by fixing a copy of the report in two or more of the most public places next adjacent to the places where the said alteration is intended to be made, or new highway to be opened, could have been designed for no other purpose than to make them aware in what manner and to what extent they or any of them might be affected. If the report proposed to treat the original allowance as unnecessary for a highway when the new road was laid out, any owner of land adjoining such allowance would, I apprehend, have a right to be heard in opposition to that part of the report, though he had no objection to offer to the new road, and the jury might modify the report, confirming the proposed new road, but refusing to confirm it by declaring the original allowance to be unnecessary; and if they gave such a verdict, no conveyance of the original allowance could have been made. I do not think that this question is to be left, as it were, in abeyance—that the surveyor is to convey, and the

validity of the conveyance is to depend on the opinion of a jury thirty years (as in this case) after the report is confirmed, as to whether the original allowance had been rendered unnecessary. The report and confirmation by the justices, or by a verdict, should decide this ; and if silent on this point, then the inference must be, I think, against the surveyor's authority—an inference by no means weakened when we find the power attempted to be executed nearly twenty years after the report made, and by a surveyor having no knowledge of the circumstances unless what the report would give, or what he derived from the information of an interested party seeking the conveyance.

Upon the whole, it is my opinion that the evidence has failed to shew the authority of the surveyor to convey, and that nothing appears to deprive this allowance for road made by the king's surveyors of the character fixed upon it by the 12th section of 50 Geo. III. ch. 1, of a "common and public highway."

According to the decision of *Rex v. Sanderson* (3 U. C. Rep. O. S. 103), this report is defective in substance ; and the new road was not legally established under it so as to deprive Farley of the land over which it runs ; but as far as the right of public highway is concerned this is no longer of importance. The long use of forty years and upwards, and the continuous acquiescence of the owners of the lots across which it has been carried, would afford abundant proof of dedication. But this will not help the plaintiff in his claim to the original allowance, which must depend upon a fact that a new road has been substituted, or the direction of an old one altered, in accordance with the provisions of the statute. The mere dedication of the new road by the proprietor of the soil over which it passed could confer no right to the conveyance of the original allowance. The Crown, which takes and conveys only by matter of record, the proprietor of lands adjoining the original allowance, and the public generally, all had rights of which they might be deprived by a strict compliance with the statute. The observations of the Chief Justice in giving judgment in *Rex v. Sanderson*, apply with still

greater force when the statute of 1810 is invoked to take away public rights, and convey crown lands—"The interference should go no further, nor be exercised in any other manner, than the legislature has expressly permitted. Statutes for all public works and objects of this kind, when they authorize depriving individuals of their property, are to be construed upon the principle last mentioned. Such powers as are given by this statute should be carried into effect regularly and carefully." In my opinion, therefore, the rule for a new trial should be made absolute.

The conviction of the defendant on the indictment for nuisance involves a further consideration. The statute 9 Vic. ch. 8 (which was not brought under the notice of the court, either during the trial or argument), recites that in consequence of roads established by law, parallel or near to government allowances for roads, and in lieu thereof, the said allowances for roads have for years remained closed and in the possession of private persons, and that great inconveniences may arise from the said allowances being thrown open without due notice, and enacts that "no allowance for road shall be opened, unless an order ordering the same to be opened shall be first made by the district council of the district in which the allowance is situated," after eight days' notice in writing to the party in possession, previous to the meeting of the council at which the application is intended to be made.

It appears clearly enough that this allowance for road never has been opened as a public highway; and this statute prevents its being opened without an order from the district (now county) council; it follows, I think, inevitably, that the defendant cannot be convicted of a nuisance in fencing up this road allowance, for though possibly the preamble does not precisely describe his case, the general words of the enacting clause embrace it.

I have not failed to consider whether the statute of 9 Vic. can be invoked by the plaintiff in support of the civil action. I do not now mean to express an opinion that it might not have afforded an answer, but not, as it strikes me at present, on these pleadings. As to "not guilty," no doubt the plaintiff was entitled to a verdict. But on the issue of

“not possessed,” or on the plea of the *locus in quo* being a public highway, which was traversed, I do not think the plaintiff entitled to succeed. On “not possessed” he relied on his conveyance from the surveyor, which for the reasons already given must, I think, fail him. And as the *locus in quo* was a public highway, because it comes expressly within the 12th section of 50 Geo. III. ch. 1, if that character of public highway was suspended, so that the plaintiff can maintain and justify the occupation of it under the 9 Vic. this should, I think, have been replied.

BURNS, J.—In the case of the indictment, judgment must be given against the Crown. The statute 9 Vic. ch. 8 recognises that there may be cases, for some cause or other where the public allowances for roads have remained closed, and are in the possession of private persons, where roads established by law are parallel or near to the government allowances; and in such cases the statute enacts that no allowance for road shall be opened, unless an order shall be first made by the district council. I should say the evidence of the new road through the defendant's farm having been used by the public since the year 1811, and the fact that it was asked for by the inhabitants, and reported upon by the surveyor of highways, will be sufficient *prima facie* evidence that it has been established by law; and that there was no necessity to prove an order of the sessions to open the new road, before the new road can be pronounced as established by law. If this be so, then we have a road established by law parallel or near to the government allowance, and the fact is proved that the government allowance has remained closed, and in the possession of the defendant, for years, and no order of the district or county council, so far as we know, has been made, directing the public allowance to be opened. Under these circumstances, the defendant cannot be deemed guilty of a nuisance.

With regard to the civil action, the difficulty I have in sustaining a recovery by the plaintiff arises from the pleadings, and the deficiency of the materials from the records of the justices. The plaintiff brings his action of trespass on

the ground that he has a perfect title to the *locus in quo*. The defendant asserts that it is a highway, and the plaintiff admits that it was so at one time, but says that it ceased to be so in consequence of the surveyor of highways having conveyed it to the plaintiff. If the plaintiff had replied, admitting the *locus in quo* to be a highway in point of law, and that it had remained closed and in his possession for many years, in consequence of the other road laid out through his farm, and that there had been no order for opening the allowance, I should have had no difficulty in saying that under such circumstances he could maintain trespass in respect of his possession, by reason of the recognition by the act 9 Vic. ch. 8, of such possession, and the enactment that no allowance for road shall, after the passing of the act, be opened unless by an order. The plaintiff has not depended upon his possessory title, but claims that the road allowance has ceased to be public property, and is now his property by reason of a conveyance authorized by law, and that question must be determined upon the effect of the provisions of the statute 50 Geo. III. ch. 1.

I take it to be a clear principle of law that every intendment is to be made in favour of the public, and against the individual who seeks to deprive the public of the right which it is confessed the public once had, or which the public has acquired by length of time or acquiescence: and that it is incumbent upon the individual who asserts a private right acquired over a public one which was once vested, or who seeks to deprive the public of a right acquired by length of time or acquiescence, that he shall do so upon clear irrefragible evidence, and that nothing shall be left to depend upon conjectural inference and assumption. I do not mean to be understood as saying anything which would give a preference to what might be thought a public right over private rights, for if the private right be prior to the public claim, which is the better expression, then nothing short of legislative enactment can deprive the individual of his rights, unless indeed he either actively, or under provisions of various laws passively, contributes or submits to the loss. These principles govern the case of the new

road laid out through Purdy's farm, and in my opinion equally apply to the case of the public allowance, for it by no means follows that, because it was more convenient to the public generally to have a road varied or altered, it must be necessarily assumed the old road became unnecessary, and that the fact of a new road laid out through a man's farm *ipso facto* entitled him to the option of saying he would take the old road in lieu of the new one taken off his property. I think there was something more required than the mere fact of taking from his property a new road, even if we should feel satisfied in our own minds that it was thought at the time of the act being done the public allowance would never be used, or could not be made into a road. This involves a consideration of the provisions of the statute 50 Geo. III. ch. 1. The 12th section of the act defines what shall be a highway; and in this case Mr. Purdy asserts he has acquired a right to a public highway so defined by the act, because the surveyor of highways has conveyed the highway in question to him—the surveyor being authorized by the same act to make a conveyance to individuals upon certain conditions, in cases where it should be found necessary to alter the direction of any highway or road already laid out, so that the land through which it formerly passed should become unnecessary for a public highway. The surveyor of highways was not invested with the power of pronouncing whether the road previously laid out were or not unnecessary. Under the 9th section, he acted merely in a ministerial capacity, to transfer the old road to the party entitled, when it was ascertained that the road was unnecessary. We must go back to the 3rd section, in order to see what roads the surveyor had the power to transfer; because the 9th section says the power is in all cases when it shall be found necessary to alter the direction of any *such* highway; and further, we must see what was required to be done before the surveyor would have the ministerial authority mentioned. It is necessary that something behind the surveyor's conveyance should be shewn, because he has himself no interest in the thing; and in order to deprive those who have the interest, the

foundation of the surveyor's act must be shewn. That foundation must be what the statute declares shall be necessary. I do not mean in mere matter of form, or that it would now be necessary to prove and establish matters, which were declared necessary to be done to give the body having power in the matter the authority to deal with it. Whenever an adjudication has been made by an authority having the jurisdiction to deal with the subject matter, it is unnecessary to prove the things required to support the adjudication, but they will be presumed; and the burthen of proof is then shifted to the person, if he be at liberty to shew it, who assert the adjudication to be based upon insufficient materials. The 3rd section of the act applies to two classes: first, when the public highways or roads *then in use* are inconvenient, and may be altered, so as better to accommodate His Majesty's subjects and others travelling thereon; and secondly, where it is necessary to open a new highway or road. In either case the application was to be made by at least twelve freeholders, and the surveyor of highways was directed to report thereon in writing, to the justices at the next quarter sessions, describing particularly the alteration intended to be made, or new highway or road to be opened. If no opposition be made, the act directs that it shall and may be lawful for the justices to confirm the said report, and to direct such alteration to be made, or such new highway or road to be opened, accordingly. Without criticising the argument that because the report in question has used the expression that the surveyor has examined the situation of the land *for a new road*, therefore it was a case of an entire new road, and not the alteration of an old one—it appears to me it was necessary it should appear either upon the surveyor's report or in the adjudication that the old road was a road *then in use*, and also was unnecessary for a public highway. If these facts appeared upon the surveyor's report, then when the justices said "allowed" or "confirmed," we should, I think, hold that by necessary implication it was an adjudication of the facts stated, and which it appears to me, were required in order to confer the power upon the surveyor of conveying

the old road. The report in question is singularly defective in affording any information; instead of describing particularly the intended alteration assuming that it was an alteration in this particular instance, he says he has examined the situation of the land for a new road; but whether that be a better place for a road than the road before laid out, or whether the position deprives others of rights or not, is left to be ascertained by oral evidence, so far as this case is concerned. The justices have said "*allowed*" to the report; that is, if we apply it technically, they have allowed that the surveyor examined the land for the new road. That is the whole substance of the adjudication; but grant it the effect of establishing the new road, and that the user of the new road under it is an acquiescence of individuals and the public generally in the use of it instead of the old road, and suppose that the oral evidence can be incorporated with the proceedings for that purpose—all these facts do not prove that the old road was condemned or adjudged to be unnecessary. Though the new road might be more convenient to the public generally, and less expensive upon the inhabitants to keep in repair, than the public allowance, yet the public allowance may, notwithstanding these circumstances be necessary for some portion of the inhabitants. The 3rd section must, I think, be read in conjunction with the 9th, when interpreting the power given to the surveyor, and taking the two together, believing, as I think the legislature intended, that the surveyor was not the person vested with the authority of pronouncing whether the land through which the road formerly passed had become unnecessary for a public road, it remains, as it appears to me, with the justices to pronounce upon that fact, when no opposition is made to the surveyor's report, as it would have rested with the jury to say, in case there had been an opposition.

The legislature undoubtedly, I think, meant that any road which was declared to be a public road by the statute, could only be dispensed with as such by some adjudication to that effect, for the surveyor's report of an alteration which is the foundation of the justices' authority, was

directed to be in writing, and particularly describing the alteration without touching upon any other matter raised. I think there should appear something in the shape of an adjudication by the justices respecting the old road, dispensing with it, before the surveyor can be empowered to convey it to any one; and for want of that, I think Mr. Purdy fails to establish a private right to deprive the public of a right of way in the old allowance, and under 9 Vic. chap. 8 it belongs to the county council to deal with it.

Rule absolute—(ROBINSON, C. J., *dissentiente*).

Judgment arrested.

BAIN, ADMINISTRATRIX OF BAIN, v. BAIN.

Nul tiel Record.

A defendant in assumpsit pleaded in abatement a former action pending, and the plaintiff replied *nul tiel record*. The declaration in the first action contained only a count for money had and received, in the second count on an account stated was added.

Held, that the replication was not supported, and that the defendant was entitled to judgment.

The plaintiff, as administratrix, had sued this defendant in assumpsit on a common count for money had and received only, claiming £100 under that count. While that action was pending she brought this second action for £100 received by the defendant to the use of the plaintiff as administratrix (as in the first action), *and on an account stated between them*. The defendant pleaded in abatement a former action pending, to which there was a replication of *nul tiel record*, and issue thereon.

Wilson, Q. C., for the replication; *Phillpotts*, contra.

In addition to the cases referred to in the judgment, *Turner v. Collins*, 15 Jur. 177, and *Kerby v. Siggers*, 2 Dowl. 559, were cited in support of the replication.

ROBINSON, C. J., delivered the judgment of the court.

I believe my brothers agree with me in the opinion which I expressed in the case of *Whyte and Whyte v. Cameron* (7 U. C. R. 378), though the decision of the court did not turn on that question, but on the plainer ground of a variance in the name of one of the parties. If

what was intimated in that case be correct, as regarded the effect of the addition of a count on an account stated in one of the actions, when there was no such count in the other, then the defendant should have judgment here.

Nothing can be more possible, and few things are more probable, than that the two counts in this declaration are upon the same cause of action; for if any account was stated it may have been nothing but an admission that the £100 was due for money had and received. The defendant asserts what is open to be traversed, when he avers that both actions were for the same cause. That is a question of fact, which the defendant undertakes to prove, and on which an issue may be raised.

In the case of *Biggs et al. assignees v. Cox*, (4 B. & C. 920,) a former action pending, which had been brought by Collier, the bankrupt, before his bankruptcy, was pleaded in abatement of an action brought by the assignees, in which latter action, besides common money counts upon promises made to the bankrupt, there was a count upon an account stated by the defendant with the assignees. The plea was on that account demurred to; and the court held it bad, for it was impossible that anything could have been recovered in the former action against the bankrupt upon an account stated afterwards with his assignees.

In *Kitchen v. Campbell* (3 Wils. 304) the court say that "*nemo bis vexari debet*" is the general rule, and that what is meant by the same cause of action is where the same evidence will support both actions; where it cannot, the causes of action cannot be identical. If we should hold that these two actions cannot have been brought for the same thing because the declaration contains an additional count on an account stated between the same parties, it would seem to be almost equivalent to holding that the declarations in the two suits must be copies of each other, for the count on an account stated is not necessarily for a cause of action different from the money had and received, though it may be; and whether it is or not would be a matter of fact to be tried by the jury, if issue had been taken upon the averment.

Judgment for the defendant.

WHYTE V. MYERS.

Deed, construction of, as to land described--Presumption.

Trespass qu. cl. fr. The plaintiff claimed under deeds from A. M. to S. M., in 1834, and from S. M. to the plaintiff in 1843. In 1829 A. M. had made a deed to his step-mother, intended to be in lieu of her dower in his father's lands. It was clear by evidence at the trial, and by the mention made in this deed of the lands adjoining, that his intention was to convey the west part of lot No. 5; but the deed described the land as "*being composed of the easterly part of lot No. 5, in the first concession of the said township of S., which said piece of land is butted and bounded, or may be otherwise known as follows: commencing where a post has been planted in front of the said concession, at the S. E. angle of the said lot, then, &c., giving courses which could be well carried out.*" It was proved, however, that S. M. had been in possession of the land in 1829, and that he and the plaintiff had held it ever since. The jury were told that the deed could pass no land which was not part of the easterly part of lot 5, but that, in confirmation of the long possession, they might presume a conveyance from A. M. to the plaintiff, which they did.

Held, that the direction was right as to the construction of the deed; but that the presumption could not be confirmed, for such a conveyance would be inconsistent with what was done in 1834.

This case was tried at the spring assizes for Belleville, in 1852, before Burns, J., and a verdict was given for the plaintiff for £10.

In the next term a rule *nisi* was obtained for a new trial on the law and evidence, and for misdirection, and on affidavits, the argument of which was delayed until this term.

The case was one of trespass *qu. cl. fr.* upon certain lands described as part of lots 4 & 5, in the first concession of the township of Sidney.

The declaration contained several counts. The defendant pleaded *liberum tenementum*, and in other pleas denied the plaintiff's possession; and justified under one Hannah Cobb, who, he averred, was seized of the property.

At the trial the plaintiff claimed title under a deed produced, made in 1834, from Archibald Marsh and his wife, to Samuel Marsh, and a deed given by Samuel Marsh to him, the plaintiff, in 1843, the execution of both of which conveyances was proved.

On the defendant's part it was proved that in 1829 the said Archibald Marsh had made a deed to Hannah Cobb (then Marsh), his step-mother, of certain land which Archibald Marsh held by inheritance from her husband, his father, which deed was intended to be in lieu of, and as a compensation for her dower, in the whole tract of which her husband

had been seized, being in all 457 acres. As a matter of fact it was made clear at the trial that the tract intended to be conveyed to Mrs. Marsh (now Cobb) by this deed of 1829, was the west part of lot No. 5, but the deed described it thus—"all that parcel of land in the township of Sidney, containing 150 acres, more or less, being composed of the *easterly part of lot No. 5, in the first concession of the said township of Sidney*, which said piece of land was butted and bounded, or may be otherwise known as follows—commencing where a post has been planted in front of the said concession, *at the south east angle of the said lot*, then north 16° west, 17 chains, to a post; then south 74° west, 1 chain and 75 links, to a post; then north 16° west, 110 chains and 12 links, to a post; then south 74° west, 14 chains and 25 links, to a post; then south 16° east to the bay shore bounded by lands owned by Moses Morse, and Henry C. Sailor; then northerly along the front to the place of beginning."

The learned judge ruled that under this deed no land could pass which was not part of the *easterly part* of lot 5, and that the tract must commence at the *south east angle of lot No. 5*, and not at the south east angle of the tract intended to be conveyed to Mrs. Marsh, if that was in fact not a part of the east part of lot 5.

Giving then to this deed the construction which the learned judge held it must receive, this deed from Archibald Marsh being made before his deed to Samuel Marsh, and covering the same ground, must prevail over it. It was proved, however, in the course of the trial that Samuel Marsh had gone into possession of this land in 1829, and that he and the plaintiff, White, in succession had possessed it ever since, and the learned judge being much pressed, considered (though he had great doubt on that point) that notwithstanding the plaintiff had endeavoured to make out a title under this conveyance which he took from Marsh, in 1843, he might, failing that, claim to have it left to the jury to presume a conveyance made by Archibald Marsh to him in confirmation of his long possession though Archibald Marsh, in 1834, made the deed to Samuel Marsh, under which the plaintiff attempted at the trial to make title.

The jury, thinking the justice of the case was much in favor of the plaintiff, made the presumption, though the defendant's counsel contended strongly against it, and on that ground they found for the plaintiff.

Vankoughnet, Q. C., in support of the rule, cited *Day v. Williams*, 2 Cr. & J. 460; *Doe dem. Woodhouse v. Powell*, 8 Q. B. 576; *Doe dem. Fenwick v. Reed*, 5 B. & Al. 232.

Richards, shewed cause, and cited *Doe Notman v. McDonald*, 5 U. C. R. 321; *Doe dem. Murray v. Smith*, Ib. 225; *Doe dem. Bonter v. Savage*, Ib. 223; *Doe dem. Moffatt v. Scratch*, Ib. 351; *Doe dem. Peterson v. Cronk*, Ib. 135.

ROBINSON, C. J., delivered the judgment of the court.

The parties have been in no haste to discuss the grounds on which this rule was moved. As regards the construction and effect of the deed made to the widow in 1829 by Archibald Marsh, we all think that it could not be taken to pass any other land than such portion of the east half of lot 5 as would be embraced within the lines run according to the description, taking the south east angle of lot 5 as the starting point. It certainly could not pass the western portion of the lot. If it could be held to do so, then the registry law would be most injurious, for it would lead a party to rely on a registration which might turn out to be utterly deceptive in regard to the land embraced in the deed. It would be as reasonable to hold that a deed of lot No. 1 could pass lot No. 2, as that a deed for the east half, or part of lot No. 1, could convey the west part of the lot. The reference made in the deed to the premises possessed by Morse and Sailor as being adjacent is sufficient to convince us, if that were not quite plain before from the plan and oral evidence that the meaning was to give Mrs. Cobb the west portion of the lot. It would materially help in a court of equity, where the object was to obtain a correction of the error; but it does not enable us in a court of law to read the deed as a conveyance of the west part of the lot. It sets out with announcing that the land to be conveyed is the easterly part of the lot, and it commences at the *south*

east angle of the said lot, and gives a description which can be will carried out from that place of beginning. All this is the substance of the description. What is added about Morse's and Sailor's lands is merely a matter of cumulative description, which is not accurate, and which cannot control the previous description. Mr. Richards's suggestion that we might read the words, "commencing at the south east angle of the *said lot*," as referring to the south east angle of the tract meant to be conveyed by the deed; is an ingenious one, but that would be, beyond all measure, a forced construction, for that tract had not yet been specified and remained to be described. The words, "*said lot*," therefore, cannot be taken to refer to that yet undefined part of a lot. Whatever may have been meant we can only take them to apply to the lot No. 5, which had been just mentioned, and especially when the deed professes to convey the south eastern part of lot 5, and not the south western part.

As to the jury being directed or recommended to presume that before Archibald Marsh made this deed in 1829 to Mrs. Marsh, he had made a deed of the same land to Samuel Marsh, which being of an earlier date might be allowed to prevail, we cannot confirm what was done in that respect. The deed taken from him by Samuel Marsh in 1834, was in itself an acknowledgment by Samuel Marsh, of the title of the other, and it would be against reason to suppose that Archibald would have conveyed to Mrs. Marsh by the deed now in question, if he had just before made a deed to another of the same land; to presume a conveyance made to Samuel in 1829, or before, is inconsistent with what was done by them in 1834.

The judgment of the Court of King's Bench in *Doedem. Fenwick v. Read* (5 B. & Al. 232), is strongly opposed, we think, to presuming a conveyance in this case, because the real facts of the case and the conveyances that were made, were before the jury; and the plaintiff had rested

his case upon the conveyance which he took in 1834, not pretending that any deed had been previously made to him.

We do not think that the possession of Samuel Marsh can be considered as adverse where Archibald conveyed to the widow of his father. It was evident that Archibald was not disseized—none of them disputed his title as heir, but they were all ready to take what he was disposed to give them in carrying out the family arrangement. Disseizin is a question of fact for the jury, and was not and could not, consistently with the truth of the case, have been found on the trial. Then, as to the objection that Samuel was in adverse possession when the widow, then Mrs. Cobb, conveyed to the defendant Meyers—if that had been found by the jury, it would not have affected the defence set up under the plea of justifying the entry by the command of Mrs. Cobb, for if her conveyance could not operate, the land would still be hers at the time of the alleged trespass.

The case is an unfortunate one. There was a strange mistake committed in 1829, in making the deed to Mrs. Marsh, which a court of law cannot rectify. There is no allegation of fraud in obtaining that deed, and it must be left at law to have its legal effect.

Nothing can be more unconscientious than for Mrs. Cobb to seek to retain her interest in, or control over, the west part of the lot, which was doubtless intended to be conveyed to her, and of which she was put in possession, and at the same time to assert a title to the eastern portion of the lot under the deed, relying upon the literal terms of the erroneous description. The case is one for a court of equity to deal with, or for an amicable compromise. We can only pronounce upon the legal rights of the parties under written instruments, and must act upon certain established principles, which admit of little relaxation in applying them; for we must bear in mind that, though Mrs. Cobb may be in possession of the western portion of lot 5, she could not in a court of law make title to it under the deed which was given to her.

We are of opinion that the verdict in this action of trespass was not consistent with the evidence, and that we must grant a new trial, leaving the costs to abide the event.

Rule absolute.

WADSWORTH ET AL. V. TOWNLEY ET AL.

Contract by sureties for performance of agreement, reciting that agreement by a wrong date—Effect of, in action against sureties—Demurrer.

K. having agreed with the plaintiffs for the purchase of some lumber, the defendants consented to guarantee his punctual payment for the same; but inadvertently the first agreement, in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties as bearing date the 22nd of December, 1851, whereas it was dated on the 8th of January, 1852.

The plaintiffs, in an action against the sureties, declared that by agreement bearing date the 8th of January, 1852—after reciting a certain agreement next thereafter stated or referred to, entered into for the sale of certain lumber by the plaintiffs to K., bearing date the 8th of January, 1852—the defendants covenanted with the plaintiffs that K. should perform the said agreement; that by the said last-mentioned agreement, the date whereof was the 8th of January, 1852, K. agreed to pay for the lumber at certain specified prices; yet that, after the making of the said last-mentioned agreement, the plaintiffs delivered to K. large quantities of lumber for which he had failed to pay. The defendants set out both agreements on oyer, and demurred, assigning for cause that the original agreement was not set forth in the declaration, or referred to with sufficient certainty.

Held, that the cause of demurrer assigned was not suited to the objection intended to be urged, as to the discrepancy of dates; and that the defendants should not have demurred, but should have pleaded "*non est factum*," and relied at the trial upon the variance between their actual agreement and that declared on.

Semble, that on such an issue, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover.

The plaintiffs having, as it would appear, agreed with one Kerr, either in writing or verbally, on the 22nd of December, 1851, (unless the insertion of that date in the paper afterwards drawn was altogether a mistake), for the sale of an undefined quantity of timber by them to Kerr, it was required that Kerr should find persons who would become his sureties that he would pay for the timber to be delivered to him according to the agreement. On the 8th of January following (1852), these defendants having consented to become sureties, two agreements were executed; one between the plaintiffs and Kerr, being an agreement for the sale of the timber from the former to the latter; the other between the plaintiffs and these defendants, on which

this action was brought, whereby these defendants guaranteed the payment of the money for which Kerr would become liable under the agreement between him and the plaintiffs; and both instruments being, as we may suppose, actually prepared and executed on the same day, were both dated on that day, the 8th of January, 1852.

The plaintiffs in this action, in suing the defendants, the sureties for Kerr, upon their agreement, stated in their declaration that by agreement dated the 8th of January, 1852, after reciting a certain agreement, which is next thereafter stated and referred to, entered into by the plaintiffs and William Kerr, of the City of Toronto, builder, bearing date the *8th day of January, 1852*, for the sale by the plaintiffs to Kerr, *of all the pine lumber the plaintiffs had at that time sawed* on their premises at the village of Weston, except what the plaintiff's might require for their own use; and that the plaintiffs had required Kerr to give them security that the plaintiffs should be paid *for the said lumber* so sold, at the times, and in the manner, and at the rates stated in the said agreement,—the defendants covenanted with the plaintiffs *that Kerr should perform the conditions of the said agreement to be by him performed according to the true intent thereof.*

Then the plaintiff's averred that by the last mentioned agreement, being the agreement in the covenant of the defendants referred to, sealed with Kerr's seal, and of which the plaintiffs make profert, *the date whereof is the 8th day of January, 1852*, the said Kerr agreed to pay the plaintiffs for the pine lumber therein mentioned, being all the sawed pine lumber which the plaintiffs then had sawed, except any of it they might require for their own use, delivered in the lumber yard of the said Kerr, in the City of Toronto, £2 for each thousand feet, inch measure, in manner following; viz., 5s. per thousand feet, as the said lumber should be delivered, 17s. 6d. on the first day of May next after the date of the said agreement, and the balance at the above mentioned rates on the first of August, 1852.

The plaintiffs then averred that *after the making of the said last mentioned agreement*, and in pursuance of the

terms thereof, they did before the first day of May, 1852, deliver to the said Kerr at his lumber yard, in the city of Toronto, a large quantity of sawed pine lumber: viz., 102,256 feet, inch measure, being all the pine lumber which the plaintiffs had sawed at the time of the making of the said agreement, except such as they required for their own use, amounting in value, at the rate mentioned in the said agreement, to £204 10s.; and that,—although there became due to the plaintiffs before the commencement of this suit, in respect of the said lumber, the sums of 5s. and 17s. 6d. in the agreement mentioned, for every thousand, feet, amounting to £150—yet that Kerr did not pay the same or any part thereof.

The defendants cravedoyer of both agreements, and that on which these defendants are sued was set out as follows:

“Whereas by certain articles of agreement entered into by C. and W. Wadsworth, of, &c., millers, and William Kerr, of the City of Toronto, builders, *said agreement bearing date the 22nd day of December, 1851*, and being for the sale of all the pine lumber the Wadsworths *have at present* sawed on the premises at Weston, excepting, as stated in the said agreement, what they may require of it for their own use; and whereas the said C. W. and W. W. have required of the said Kerr that he should give them good security that they shall be paid *for the said lumber* at the times, in manner, and at the rate or price stated *in the said agreement*; now we, the undersigned W. T. and M. T. do hereby voluntarily become security for the said Wm. Kerr, *that he shall do and perform the conditions of the said agreement*, to be by him done and performed, according to the true intent and meaning, so that the said Wadsworths may sustain no loss by reason of the said Kerr not paying them according to the true intent and meaning of the said agreement. In witness whereof, we have herunto set our hands and seals this eighth day of January, 1852.”

The original agreement, viz., that between the plaintiffs and Kerr, was set out onoyer in these words:—

“We Charles Wadsworth and William R. Wadsworth, of

the village of Weston, millers, have sold to William Kerr, of the City of Toronto, builder, all the sawed lumber we have at present sawed, except any of it we may require for our own use; said William Kerr agrees to pay the said Charles Wadsworth and William R. Wadsworth for the aforesaid pine lumber, delivered in Toronto, in the lumber yard of the said William Kerr, £2 currency per thousand feet, inch measure—5s. as said lumber is delivered, 17s. 6d. *on the first day of May next after this date*, and the balance at the rate of £2 currency per thousand feet, inch measure, on the first day of August, 1852. In witness of this agreement the above named contracting parties have hereunto set their hands and seals this eight day of January, one thousand eight hundred and fifty-two."

The defendants having set out the two agreements on oyer, demurred to the declaration, assigning for cause "that the articles of agreement in the declaration first mentioned are not set forth in the declaration, nor therein referred to with sufficient certainty, so that the nature, purport, and contents thereof can be fully seen and understood; and that without the same being fully set forth, or the contents thereof made to appear, the plaintiffs' cause of action, or the nature of the defendants' liability cannot be understood."

Eccles for the demurrer.

Vankoughnet, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

When we look at the agreement averred in the declaration to have been made between the plaintiffs and Kerr, as it is there set out on oyer as made between the same parties, upon the same subject matter, and in the same words, both special in their nature, yet exactly corresponding in all particulars as to sums and times of payment—one dated the 22nd of December, 1851, and the other on the 8th of January, 1852—whatever effect we could allow this impression to have in determining a question strictly raised by demurrer upon the record, we cannot doubt, I think, and in truth I do not doubt, that the defendants, in the deed by which they bound themselves as sureties for Kerr, had no other agreement of his in their mind than that by which

they bound themselves on the 8th of January, 1852, and were referring to no other, although by mistake they refer to it as bearing date the 22nd of December, 1851, that being perhaps the day on which the terms had been settled, and some minute or draft of an agreement drawn up between the parties, but not the date of the instrument afterwards formally executed for carrying out that contract.

The defendants gave no note of any other exception intended to be taken in arguing the demurrer than that which they had specially assigned for cause; and the plaintiffs objected on the argument that they had no right to go upon any other ground. It is clear they have no such right, though the court may in their discretion take notice of and give effect to any other exception which must have been fatal on general demurrer, if the defendants had entitled themselves to urge it; and in exercising that discretion, the court are to consider whether by entertaining the exception they would be advancing justice, or throwing vexatious impediments in its way.

What the defendants object to in the cause of demurrer which they have assigned, is, not that the agreement which Kerr was to perform is misstated in the declaration, but that it is not set forth or referred to with sufficient certainty, so that its nature can be fully understood; but certainly that exception does not lie to the declaration, for the particulars of the agreement which Kerr is alleged in it to have made, are set forth in the declaration fully and minutely. It may be that what the defendants mean, though they have not chosen to be explicit in stating it, is that the agreement of these defendants as set out on oyer is what we are to regard as the one on which this action is brought; that that agreement refers to the agreement which Kerr had entered into as one bearing date on the 22nd of December, 1851; but that the plaintiffs in their declaration are suing the defendants as liable by reason of Kerr's non-performance of an agreement made by him on the 8th of January, 1852, which cannot be the agreement of the 22nd of December, 1851; and that the plaintiffs have not, as the defendants contend, set forth the nature and contents of the agreement

referred to, and recited in the defendants' covenant which is sued upon, because they have not set forth the contents of any agreement bearing date on the 22nd of December, 1851. In their declaration the plaintiffs are careful to make no reference to the date mentioned in the recital in the second instrument, as being the date of Kerr's instrument.

They state truly in their declaration that the defendants by their agreement dated the 8th of January, 1852, after reciting a certain article of agreement *which is in the declaration next stated and referred to*, entered into by the plaintiffs and Kerr, and which the plaintiffs say bears date the 8th of January, 1852, and was for the sale by the plaintiffs to Kerr of all the pine lumber which the plaintiffs had at that time sawed at their premises in Weston, except, &c.; the defendants covenanted with the plaintiffs that Kerr should *perform the conditions of the said agreement*, according to the true intent and meaning thereof. And then the plaintiffs aver *that by this last mentioned agreement—being the agreement in the said covenant of the defendants' referred to* (and of which they make profert)—*dated the 8th of January, 1852, Kerr agreed to pay to the plaintiffs for all the pine lumber therein mentioned, being all the sawed pine lumber which the plaintiffs then had sawed, &c., delivered in Kerr's lumber yard in the City of Toronto, a certain price per thousand feet in certain proportions, and on certain days, which are specified, and which are to fall after the 8th of January, 1852.*

The plaintiffs next aver that after this agreement they delivered to Kerr, at Toronto, a certain quantity of lumber, being all the pine lumber which they had sawed at the time of making the said agreement—that is, on the 8th of January, 1852; but that Kerr has not paid for the same according to his agreement.

Now, certainly, in this statement of the plaintiffs' cause of action there is no want of fullness and particularity. It is quite clear that the plaintiffs do assert all that can be necessary to shew what Kerr had agreed to do, according to their account of the matter, and when they came to set out the two agreements afterwards on oyer, they shew an

agreement of Kerr, bearing the date which they say his agreement did bear, and in the very terms in which they say it was expressed ; and they aver that it was this agreement which the defendants covenanted should be performed by Kerr.

What the defendants perhaps meant to object is that the plaintiffs are not at liberty to say that the stipulations which the defendants refer to in their covenant are those which are contained in Kerr's agreement set out on oyer, because the latter bears date on the 8th of January, 1852, and not on the 22nd of December, 1851, which is the date of the agreement recited in the deed executed by these defendants. But that is not such an exception as is taken in the special demurrer. It is grounded on a complaint of repugnance between the declaration as it at first stood and the oyer which is to be now taken as a part of it. What may be meant is, that the plaintiffs are not at liberty to say that the agreement referred to by the declaration in their deed as being dated the 22nd of December, 1851, is the one referred to in the declaration, which speaks of an agreement dated the 8th of January, 1852 ; in other words, that even if there be an error in the recital, the discrepancy is fatal in a court of law, and can admit of no explanation that will help it. If the exception had been urged in that shape, we should have had to consider whether we could or could not hold the identity of the agreement of Kerr as set out on oyer with that referred to in the defendants' contract to be established by the contents, rejecting the date given in the recital as an erroneous description of the instrument, or whether we must hold that the inconsistency between the dates of Kerr's agreement as described in the declaration and as stated in the recital of the defendants' agreement now sued upon constitutes a repugnance upon the face of the record, which must be fatal upon an exception strictly raised on that ground.

However that might be, it is quite clear that the plaintiffs do aver, whether rightly or not, that the agreement which Kerr entered into, and which the defendants covenanted he should perform, bound him to do certain

things, which the declaration does minutely specify, and which the plaintiffs aver he has not done. And it is one thing to object that the plaintiffs have no right to say that the deed referred to in the defendants' covenant is the same one of which they give oyer, and of which the declaration states the particulars fully; and another thing to say that the contents are not set forth in the declaration, nor referred to with sufficient certainty.

This cause of demurrer which the defendants have assigned is not suited, I think, to the nature of the exception which it was intended by them to urge. The plaintiffs are not going in their declaration upon any agreement made by Kerr in December, 1851. They charge that it was on the 8th of January, 1852, that Kerr entered into the agreement in respect to which they are suing these defendants as his sureties, and they give oyer of exactly such an agreement of Kerr's as they have set forth in their declaration. It is obviously not relevant to the case to object that they have not fully set out the particulars of an agreement made by Kerr in December, 1851, when they have not grounded their action on such an agreement, but on one which they allege bears a different date.

That a demurrer is not suited to the nature of the objection which the defendants mean to urge, is, I think, shewn by what is said in the note to 2 Saunders, 367. I refer also to *Snell v. Snell* (4 B. & C. 749). The defendants mean, no doubt, to aver that they did not bind themselves that Kerr would fulfill such an agreement as the plaintiffs in their declaration allege him to have made; and they call upon the court by their demurrer to determine that the records shews it, for that the plaintiffs must now be looked upon as adopting the date which the defendants have given to Kerr's deed in the recital contained in the latter deed as set out on oyer, and cannot therefore sustain their action as brought by reason of Kerr's non-performance of a deed bearing another date. But if that be so, which I do not concede, then the defendants' course was to plead *non est factum*; and upon the trial of the issue it would have been for the defendants to contend that their

deed was not such a deed as was declared upon, because by that deed they bound themselves that Keir should fulfil an agreement made in December, 1851, and not one made in January, 1852.

It is not very material to inquire in disposing of this demurrer, what would have been the result of raising such an issue, but I think it would have depended on evidence of the fact (which would have been admissable) whether there were two agreements or only one. If, besides the agreement of Kerr, of which oyer is given, there was another made and dated in December, 1851, then, no doubt, it would be to that agreement that the defendants' covenant must be applied; but if it were shewn that there never was in fact but the one agreement—namely, that which Kerr did execute in January, 1852—it would be then established that the agreement, which as to its contents was truly set out, had been described by the defendants by a wrong date in their recital of it in their own deed. And it is a principle of law that an error in a recital does not vitiate.

If a bond were given for £5,000, by mistake instead of £500, or *vice versa*, where no fraud was practised, then undoubtedly there would be a necessity for going to Chancery to reform the agreement, but not where the only mistake is, that in the recital of one deed in another a wrong date is given to it, when the substance is correctly set forth, and it is proved or admitted that there was but the one instrument, which is falsely recited. If A. were to recite that there was a house belonging to B. in lot G., in a particular street, of which house one F. was in possession, and were to covenant with B. that he would put that house in a good tenantable state of repair for £100, he would be bound by his covenant to repair that house, although it should turn out that one P. and not F. was in possession of it, provided it were shewn that there was no other house but the one on lot G. The error in the recital would not vitiate when it was in mere matter of description which need not have been inserted, and when there could be no doubt as to the substance of thing referred to.

For these reasons we think the plaintiffs are entitled to judgment on demurrer.

Judgment for plaintiffs on demurrer.

REGINA v. McLEOD, IN RE MILLER v. McLEOD.

*Attorney suing for costs and proceeding by attachment at the same time—
Order of Court thereon.*

The plaintiff, an attorney, brought an action against the defendant for costs as between attorney and client. Before entering appearance, the defendant procured an order for taxation, and in granting this order an undertaking was exacted from him to pay what should be found due. This order was made a rule of Court, and an attachment irregularly issued upon it—under the pressure of which the defendant paid the amount taxed. The plaintiff also proceeded in the suit by signing interlocutory judgment.

The court, under these circumstances, ordered that the plaintiff (as an attorney) should pay the money received by him into court—that the defendant should be relieved from his undertaking to pay the sum taxed—that the interlocutory judgment should be set aside without costs—and that the plaintiff should pay the costs of this application.

Hagarty, Q. C., obtained a rule *nisi* in the Prattice Court, which was referred to the full court, that Mr. Miller, who sued out the attachment in *Reg. v. McLeod*, and who was plaintiff in the civil suit, should shew cause why the rule for attachment, the attachment, and all proceedings thereon, should not be set aside; and Miller be ordered to refund to the defendant McLeod, or his attorney, Hugh Richardson, £55 13s. 7d. paid under protest to Miller upon the attachment—

1st. Because the undertaking to pay the costs was improperly exacted from McLeod, on granting the order for taxation.

2ndly. Because the attachment was illegally issued—no order having been made to pay the costs taxed, and the rule having been made absolute for attachment in the first instance.

3rdly. Because Miller elected to proceed by suit for his costs, and could not at the same time urge his remedy by attachment.

4thly. Because the attachment was moved for on the last day of term.

And why proceedings in the action should not be set aside, because they were taken in disregard of an order to stay proceedings—interlocutory judgment having been signed after the attachment issued, and subsequent proceedings being taken in the cause after the money had been actually paid in consequence of the attachment—with such directions as to costs of applications in chambers, of this application, and other matters connected with the proceedings of Miller in the premises, as the court should think proper.

The action was brought for costs as between attorney and client, claimed by Miller as attorney.

After summons served, and before appearance, McLeod, by his attorney, procured an order to tax the bills, and to stay proceedings in the suit until taxation. The judge, in making the order, exacted the defendant's undertaking to pay what should be found to be due on taxation.

This order, obtained on the 24th of April, 1852, was made a rule of court on the 7th of September, 1852. The plaintiff obtained an attachment upon it, having irregularly taken out the rule absolute in the first instance, and under the pressure of this attachment the defendant paid the amount of costs taxed.

On the 13th of September, 1852, the plaintiff signed interlocutory judgment in the action.

On the 2nd of October, 1852, a judge's summons was taken out to stay proceedings, or set aside interlocutory judgment, or to let the defendant in to plead.

In an affidavit of McLeod, made on the 13th of April, 1852, when the order to tax was moved for, he swore that he had an account against Miller for goods sold him of £38 4s. 6½d., and two judgments against him amounting to £32, all unpaid; and that Miller had, notwithstanding, sued him in this action for costs—by summons served on the 12th of April, 1852.

The taxation did not take place till August or September, 1852.

Mr. Miller filed an affidavit in answer, asserting that a considerable sum was due to him: that he was not aware of its being irregular to take out an attachment absolute

as of course in such a case : that he had no recollection of the money being paid under protest ; and that he had no objection to the defendant being relieved from the judgment by default on the usual terms.

Eccles shewed cause, and cited Ch. Archb. 112.

ROBINSON, C. J., delivered the judgment of the court.

Before *Williams v. Griffith* (6 M. & W. 33), which decides the contrary, the practice seems to have been that when a defendant, being sued by his attorney for costs, moves to have the plaintiff's bill taxed, he must enter into an undertaking to pay the amount taxed. The books of practice down to that time lay down that as the course. In *Williams v. Griffith* the court, for reasons which seem convincing, determined that *where the bill contains taxable items*, the court has *authority* after action brought to refer it to be taxed, without requiring any admission of liability on the bill, or calling on the defendant to abandon any defence which he may have at *Nisi Prius*. The present seems a very strong case to shew the propriety of this principle, for here the defendant has two judgments against the attorney which he swears are unsatisfied.

The question is, in the actual position of the parties as shewn by the affidavits, what should be done. All the above case decides is, that the court has authority to refer without exacting an undertaking.

Here the judge, proceeding on the old practice, though he might have dispensed with the undertaking, exacted it—this decision in England not coming under his notice. The defendant allowed six months to elapse without seeking to be relieved from the undertaking, and it is yet in force, and the *amount taxed* has in consequence been paid to the plaintiff, though under the pressure of an attachment irregularly issued, without the defendant being previously called on to shew cause. It would be absurd and useless to allow the action to go on, in the face of the defendant's undertaking and without ordering the money to be returned. But nothing can be consistently done while the defendant's undertaking is in force.

We see no other course than to order Mr. Miller (as an attorney) to pay the money into court before the first day of next term—to relieve the defendant from that part of the order which relates to the paying the amount taxed, and to leave the plaintiff to go on with his action—to set aside the interlocutory judgment without costs, and allow the defendant to plead by the first day of next term—and that the attorney pay the costs of this application.

The above was the order made.

CADMAN AND WIFE V. STRONG.

Inconsistent verdicts in different actions, effect of—Admissibility of wife as witness.

Where as action of ejectment brought by a purchaser at sheriff's sale, the jury had found that the debtor was living when the *fi. fa.* bore teste, and therefore sustained the plaintiff's claim; and in a subsequent action by the debtor's widow for dower, damages were given for detention, *on the ground that the husband died seised*—the court refused on account of this inconsistency, to set aside the verdict, which was not clearly against evidence.

In an action for dower by husband and wife, the wife is a competent witness.

Action for dower. Plea—"ne unques accouple."

Suggestion—that the first husband of the demandant (Abraham Hagerman) died seised, and damages claimed for detention of dower.

So far as the merits were to be considered, this case only brought up in a new shape, and for a new purpose, the contested point, at what time one Abraham Hagerman—whose lands had been sold under a writ of *fi. fa.* delivered to the sheriff of the district of Newcastle, on the 13th of July, 1833—should be deemed to have died. If he was dead when the execution issued, then his lands had devolved upon his heir, and the writ could not affect them. If he was then living the lands passed to the purchaser at the sheriff's sale. At what time he had been last seen or heard of was the question of fact which the jury had to determine upon several trials which had taken place of actions of ejectment between the heir-at-law of Abraham Hagerman and the person claiming under the sheriff's deed; and then at what time he should be assumed to have ceased to

live, according to the application of certain principles which regulate the legal presumption in such cases, became a question which might be more or less a question for the court upon the facts that were found by the jury. The evidence, and the conclusion which the court and jury came to upon it, are reported in 4 U. C. R. 510, and 8 U. C. R. 291. Upon both trials referred to the result arrived at sustained the sale under the execution, upon the presumption entertained that Hagerman was living when the *fi. fa.* against the lands issued, and at any rate when it bore teste.

In the present action his widow, who had since married Cadman, the plaintiff, was demanding her dower in a portion of the lands sold under that execution, and she demanded also her damages by reason of the detention of her dower, having suggested on the record that her husband died seised. Whether he did die seised or not depended on the question of fact that had been so much disputed in the ejectment—whether he died before the execution could attach upon his lands. If he did, then the widow was entitled to damages. If he did not, then his seizure, it was contended, was divested by the sale, and she would not be entitled to damages, at least not till after her demand.

The wife was admitted as a witness, though objected to by the defendant's counsel.

The jury found for the demandant, and assessed the damages at £15, for six years' detention.

Vankoughnet, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, and the reception of improper evidence.

Eccles shewed cause, and cited *Stapleton v. Croft*, 21 L. J. (Q. B.) 247.

ROBINSON, C. J., delivered the judgment of the court.

In the contest between the heir-at-law and the purchaser under the sheriff's sale, who had paid a valuable consideration for the land in good faith, and had been long in possession, and made large improvements, the inclination of the jury may naturatly have led them to take a view of the case as much in his favor as the evidence would warrant.

On the other hand, the jury, who had to determine in this case between the widow claiming her dower and the person holding under the sheriff's sale, may have been disposed to look as favorable as they could on the claim of the widow.

It is certainly very undesirable that there should be such an inconsistency in the administration of justice, as that for one purpose, and as affects one person's interests, the sale under the execution should be upheld as legal; and that for another purpose, and as affecting another person's interests, the same sale should be held in effect to have been illegal and inoperative. Nevertheless such inconsistencies may sometimes occur, though courts of justice should endeavor strongly to avoid them, if it be possible.

With respect to the damages which may be recovered by the demandant in actions of dower, our late statute 13 & 14 Vic. ch. 38, has made no change in the law. A demand was proved in this case, though not made long before the action brought; that, however, could not entitle the widow to damages from the time of the demand when the husband did not die seized; and, admitting that proof of his dying seized was necessary to warrant this verdict we can by no means deny that such evidence was given, and sufficient, if it satisfied the jury, to warrant their finding as they did. If we could say that the verdict was clearly against the weight of evidence, we should have no hesitation in granting a new trial, for it is certainly desirable that there should not be inconsistent judgments in respect to the same title. As to the admission of a wife as a witness, we think we cannot hold that to have been illegal in this case, when she was a party herself to the record, and so entitled to give evidence in support of her own right. That point has been so ruled in *ejectment in Stokehill and wife v. Pettingell*, (21 L. J., Q. B., 249, *note* 9), and we see nothing in our own act that could call for a different decision.

Rule discharged.

WILMOT V. WADSWORTH ET AL.

Sale of flour deliverable on board in good condition—Damage received while waiting for vessel—Liability for.

On the 4th of June, 1852, the plaintiff bought from the defendants, through their agent, 1,100 barrels of flour, and received a sale note as follows:—

TORONTO, June 4th, 1852.

MESSRS. C. & W. WADSWORTH.

"I have this day sold for your account 1,100 barrels of flour at the Humber, guaranteed to inspect as No. 1 superfine in Montreal, Boston, or New York, deliverable free on board in good order and condition at 16s. 9d. per barrel."

Having made the purchase he wrote to G., with whom the flour was stored at Milton Mills, on the River Humber, subject to the defendants' order, saying that he expected the steamer "Marion" would be at the Humber in the morning, and that he proposed shipping this flour on board of her. On the 5th of June, he wrote again to G., saying that the steamer would be ready to commence loading on the morning of the 7th, and desiring him to arrange accordingly.—On the 7th, the defendants gave to the plaintiff their written order upon G. to deliver the flour to the plaintiff or order, and the plaintiff transmitted that order to G., with directions to ship the flour on the "Marion," consigned to certain persons in Boston, the defendants to pay shipping charges.—The flour was shipped on the 9th, but when G. received the plaintiff's notice, he had immediately sent it down the river to be ready for the steamer; while waiting there in the scow, there was much rain, and when the flour reached Boston, it was found to be injured. The jury found that the plaintiff was entitled to £62 damages, of which £50 was occasioned by wet while in G.'s warehouse, and £12 while in the scow.

Held, on motion for a new trial, that the plaintiff's conduct was not such an interference as to take the flour out of the hands of the defendants, or their agent, from the time of leaving the mills, and to relieve them from liability for damage received while in the scow; and that the verdict must therefore be allowed to stand.

An affidavit of the due taking of a commission to examine witnesses need not be signed by the deponent.

On the 4th of June, 1852, the defendants, through their agent, F. Whitney, sold 1,100 barrels of flour to the plaintiff, and gave him a sale note as follows:

TORONTO, June 4th, 1852.

"MESSRS. C. & W. WADSWORTH,

"I have this day sold for your account 1,100 barrels of Weston flour at the Humber, guaranteed to inspect as No. 1 superfine in Montreal, Boston, or New York, deliverable free on board in good order and condition, at 16s. 9d. per barrel."

The plaintiff declared in this action in assumpsit, complaining that, though he paid the price of the flour, yet the defendants did not deliver it in good order and condition but on the contrary, delivered the same to the plaintiff in a damaged state, being wetted and spoiled. In a second count the plaintiff laid as special damage that he sent the

flour to Boston, and on the 20th of June, 1852, caused the same to be inspected there, when it turned out to be so much damaged by wet that it would not pass inspection as warranted by the sale note, but was rated as of a quality much inferior ;—and the plaintiff set out the particulars of the inspection, and the loss that he had to submit to in consequence on the sale of it.

The defendants pleaded—

1. That they did not promise, &c.
2. To the first count, performance.
3. To the second count, performance, in a more special form.

At the trial at Toronto, before BURNS, J., the facts appeared to be these :—On the 4th of June, 1852, the plaintiff, having just then made the purchase, wrote to Mr. Gamble, his agent, with whom the flour was stored, at Milton Mills, on the River Humber, subject to the defendants' order stating that he expected the steamer "Marion" would leave St. Catharines for Toronto the next morning, and would be at the Humber in the afternoon, and that he purposed shipping on board of her 1,100 barrels Weston flour, &c. On the 5th of June, the plaintiff wrote again to Mr. Gamble, saying that the "Marion" would leave St. Catharines that afternoon (Saturday), and would be ready to commence loading on Monday morning early, and desiring him to make arrangements accordingly. On the 7th June the defendants gave to the plaintiff their written order upon Mr. Gamble, to deliver to the plaintiff or order 1,079 barrels of Weston flour, adding that they would hand over to him the warehouse receipts on the first convenient opportunity; and the plaintiff transmitted that order to Mr. Gamble with directions to ship the flour on the "Marion," consigned to certain persons in Boston, the shipping charges to be paid by the defendants. The flour was shipped at the mouth of the River Humber, on Wednesday the 9th of June, and sent to Boston; and in order to shew the condition in which it was when inspected there, witnesses were examined in Boston on interrogatories.

It was objected by the defendants' counsel that the proof

of the commission having been duly executed was defective; 1st. because each of the commissioners administered to the other the oath required to be taken. 2nd. because there was no sufficient affidavit of the due taking of the evidence. The two commissioners made a written statement, which was annexed, and returned with the commission, of the manner in which they had proceeded to execute the commission, which statement was dated the 22nd of October, 1852, and contained all that could be necessary to be shewn. They subscribed this, and at the foot of it was a certificate signed by the Mayor of Boston, to which the seal of the city was attached, that "October, A. D. 1852, Edward Avery, one of the commissioners, made oath before him that the statements made in the foregoing certificate are true; that he is acquainted with the deponent, and that the foregoing affidavit was duly taken before him *on the day and year aforesaid.*" The learned judge received the evidence, subject to the opinion of this court on the sufficiency of the proof of the due taking. It was to the effect that 170 barrels of the flour were found upon inspection to be damaged by water, and that the damage was appraised at £63 15s.; some other portions of the lot were found to be of inferior quality, and some of light weight.

On the evidence, it became a question at the trial, in what way the damage had occurred. The flour had been many months in Mr. Gamble's warehouse, which, being near the Humber, was subject, it seemed, to be partially flooded by a rise of water in the river; and the question of fact was whether it was in this way that the injury, or the greater part of it, had accrued. It was proved that when Mr. Gamble received the plaintiff's notice that the Marion was coming, he despatched the flour immediately in a scow down the river, that it might be ready to be put on board as soon as the vessel should arrive; that the Marion did not arrive till the Wednesday following; and that in the mean time, while the flour lay in the scow exposed to the weather, there was much rain, which the defendants endeavoured to establish must have occasioned the damage, and nothing that had occurred in Mr. Gamble's warehouse;

and they contended that, under the circumstances, they were not responsible for that injury.

The learned judge left it to the jury to find from the evidence from which of the causes the injury had arisen, or whether partly from one and partly from the other, in which case he desired the jury to distinguish how much of the damage could properly be attributed to each cause. The jury found that the damage in all to which the plaintiff was entitled was £62, of which £50 was the amount of damage sustained by wet received in the warehouse, and £12 from the rain while the flour was in the scow on the river waiting for the steamer. It was proved that much of the flour passed as of a quality superior to No. 1 superfine, and therefore above the contract; and the jury allowed for that circumstance in favour of the defendants, in the computation on which they founded their verdict.

Vankoughnet, Q. C., moved for a new trial on the law and evidence, for misdirection, and for the reception of improper evidence; or that the verdict be reduced by striking out the damage given for the injury done to the flour while in the scow.

Hagarty, Q. C., and *Connor*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

As to the evidence under the commission, we think it was properly received under the 18th section of our statute 2 Geo. IV. ch. 1. The principal objection resolves itself into this, that the affidavit proving the due taking is not signed by the deponent, which objection has been already overruled in this court in *Passmore v. Harris* (4 U. C. R. 344). The statute gives no particular direction as to the commissioners being sworn before executing their duty, and we do not hold it to be insufficient or irregular for each of the commissioners to administer the oath to the other; that is indeed the usual course, and is directed by the commission.

Upon the evidence, we cannot say that the jury were not warranted in finding that the greater portion of the damage to the flour was suffered while it lay in the warehouse. The fact may have been otherwise, and there is evidence

to lead to a contrary conclusion ; but there was also testimony which goes clearly to support the opinion formed on this point by the jury, and there is ground for contending that the weight of evidence is in favor of it, though no doubt Mr. Gamble's evidence is strong the other way so far as regards his opinion of the cause of the damage. It was for the jury to judge of the conflicting evidence ; and, taking into consideration all that was sworn on this subject, including the testimony of Mr. Howland as to the admissions made to him by the defendants, we cannot properly interfere with the verdict as regards that point. Then this leaves only the sum of £12 subject to any question ; and as to that we are of opinion that the verdict was right, for that the defendants were liable for any damage received by the flour till it was delivered on board ; and if this be so, then the defendants have been justly held liable for the whole damage, and it is no longer of any consequence to inquire whether the jury judged rightly in attributing the greater portion of the injury to what occurred in the warehouse. We think there is no ground for holding that the plaintiff did anything which relieved the defendants from their undertaking to deliver the flour in good condition on board. Mr. Gamble held the flour as agent for the defendants ; the plaintiff was obliged to communicate with him as such agent, in order that it might be known when and where he desired the flour to be shipped.

The defendants seem to have well understood that it was incumbent on them to see the flour shipped, and they acted accordingly, though if they had given themselves no trouble about it, and had left Mr. Gamble to take his own measures for putting the flour on board, the latter would have been equally acting as the defendants' agent. Whether the defendants were active in the matter, or left the care of the shipping to Mr. Gamble alone, they would equally be responsible that the flour should be delivered on board in good condition. Mr. Whitney, as broker, managed his part of the transaction carefully and regularly ; and the plaintiff, when he sent to the defendants' agent the shipping order which he had received from them, gave him no other

instructions than to ship it, at the defendants' charge, on board the "Marion." That was not taking the business of shipping off the defendants' hands, nor interfering between them and Mr. Gamble as their agent, nor dispensing with the defendants' engagement to deliver in good condition on board. It was only calling upon them to fulfil that engagement, and enabling them to do it by pointing out the place and time of shipment. As to any damage that the flour had received in the warehouse, it is not contended that on any ground the defendants can be exempt from answering for that; and as to the injury found to have been received from rain while the flour was lying in the scow, it must come as clearly within the terms of the sale note given by the defendants, unless we could hold that the plaintiff had so interfered before the shipment as to take the flour out of the hands of the defendants or their agent from the moment that it left the warehouse at Milton Mills. We think this cannot be held to have been the consequence of the mere sending to Mr. Gamble the order to ship. The three or four days' delay in the steamer arriving, was a casualty which the plaintiff did not insure against. He stated truly what he heard and expected as to the vessel leaving St. Catharines; and it was the duty of the defendants, who had engaged to deliver the flour on board in good condition at their own charge, to take care that it was either not taken from the warehouse sooner than was necessary, or that it should be protected against injury from the weather on its way. We see no ground on which it could be held that the defendants are less liable for the flour not having been delivered on board in good condition, than they would have been if the warehouse at Milton had been their own, and they had on their own scow carried it down the river, for Mr. Gamble was their agent as warehouse-keeper and carrier. All the plaintiff did was to inform him when and where the flour was to be shipped.

Rule discharged.

SHANAHAN V. SHEERIN.

Covenant for title—Plea to—Demurrer.

To an action on the covenants for title and right to convey in a deed of bargain and sale, the defendant pleaded that one J. C. was seized in fee and had good right to convey, and did convey to the defendant, by means whereof all the estate and title of the said J. C., became vested in defendant, and the defendant thereby became and until the making of the indenture declared upon continued to be, seized of as great an estate as the said J. C.—Verification.

Held, on demurrer, plea bad, as being only an argumentative assertion of the defendant's title; and that the defendant should have averred directly that he himself was seized, and need not have set out a derivative title.

This was an action on the covenants for title and right to convey, contained in a deed of bargain and sale of certain property by the defendant to the plaintiff—the breaches alleged being that the defendant was not seized, and had not the right to convey, as stated in his covenants.

The defendant pleaded that before the making of the said indenture one John Carter was seized in fee simple of the lands therein described, &c., and had in him good right to convey to the defendant; and that the said J. C. being so seized, and having such right, did afterwards, by an indenture of bargain and sale, grant, bargain, sell, &c., the said lands to the defendant, his heirs and assigns, forever; by means of which last mentioned indenture all the estate, right, and title of the said J. C. in the said land became vested in the said defendant, "and he the defendant thereby became and was, and from thence until the making of the debenture in the declaration mentioned continued to be, seized of the said lands, tenements, and hereditaments, with the appurtenances, in as large and ample a manner, and of the same and of as great an estate therein, as the said John Carter; of which said estate he the defendant was seized at the time of the said making of the indenture and covenant in the declaration mentioned and set forth, and this the defendant is ready to verify, &c."

The plaintiff demurred to this plea, assigning several causes of demurrer, of which those that are material are noticed in the judgment.

Wilson, Q. C., for the demurrer, cited *Lord Newborough v. Schroder*, 7 C. B. 397; *Jones v. Corbett*, 2 Q. B., 828; *Wheeler v. Wright*, 7 M. & W. 359.

Richards, contra, cited Bradshaws's case, 9 Rep. 60 & 61 ; 2 Saund. 181 b ; *Lemesurier v. Willard*, 3 U. C. R. 285.

ROBINSON, C. J., delivered the judgment of the court.

We do not take this to be a case in which it was either necessary or proper for the defendant to set out a derivative title, as it would be if he were a party suing as assignee on a covenant that ran with the land. It is true it is said in Bradshaw's case, to which Mr. Richards referred (9 Co. 60), that the plaintiff in his declaration on a covenant for title need not shew in whom the title was, but need only aver that it was in the defendant; for that "it lies more properly in the knowledge of the lessor what estate he himself has in the land when he demises, than if the lessee who is a stranger to it; and therefore the defendant ought to shew what estate he had in the land at the time of the demise made, by which it might appear to the court that he had full power and lawful authority to demise it." But I do not take that to mean anything more than that he is to aver positively of what estate he is seised, not that he is to set out a derivative title, and conclude with a verification, thereby tendering an issue upon the title of others rather than asserting his own title, which the declaration had denied, and concluding to the country. The same case of *Salmon v. Bradshaw* is reported in Cro. Jac. 304, and there what the court is reported to have said is, that the plaintiff was under no necessity of shewing what other person was seised, for it lies not in his knowledge; "but the defendant ought to have maintained that he was seised in fee, and had a good estate to demise." Now in that respect these pleas are deficient, for they do not maintain that the defendant was seised in fee, otherwise than argumentatively, and by inference. The defendant says that Carter was at one time seized in fee of a good title, and that all the title he had he conveyed to the defendant, and that the defendant continued seised of as good an estate as Carter had. This is all matter of inference and comparison; and however inevitable the conclusion may be that the defendant must have been in consequence seised as he averred he was, that only shows that he had it in his power to assert

plainly and directly that he was seised according to his covenant; it does not dispense with the necessity for his making that averment. The plaintiff charges negatively that the defendant was not seised; the defendant must meet that by expressing with certainty, and directly that he was seised. The setting out the title of Carter as matter of inducement may do no harm, but it does not relieve the defendant from the necessity of asserting formally his own seisin, and resting the issue upon that.

There are several cases in the books which seem at first to shew it to be necessary that the defendant in such a case should set out his title, as in *Gill v. Glasse* (Yelv. 227), but that may be confined to cases of lessors or others having only a particular estate.

The defect in these pleas is, that the defendant does not conclude by expressly averring himself to have been seised of a good title; but only that he was seised of as good an estate as Carter had held.

Judgment for plaintiff on demurrer.

McDOUGALL ET AL. V. FISH

Amendment.

Where the plaintiffs, on demurrer to their replication, had obtained leave to reply *de novo*, but from some misunderstanding omitted to do so in time, and judgment was pronounced on the demurrer, though not entered; the court allowed them to reply *de novo*, on application made *in the term after the judgment*.

On the 16th of June, 1852, a demurrer to the plaintiffs' replications to the defendant's fourth and fifth pleas was argued. In the same term the defendant's attorney, Mr. Dalton, had obtained a rule nisi for a new trial of this same case, on various grounds. The plaintiffs' attorney, Mr. Bell, consented that that rule should be made absolute, and then applied to the court, making affidavit that at the trial a verdict had been rendered for the plaintiffs for £161; that he had consented to the rule being made absolute for setting aside that verdict, in order that he might move for leave to withdraw his replications which were demurred to, and to reply *de novo*, that the cause might be fairly dis-

posed of on the merits; and he swore that he believed the plaintiffs had a good right of action in this cause upon the merits. The court granted him a rule *nisi* to amend as prayed, and in Trinity term (4th of September, 1852,) that rule was argued, Mr. Dalton shewing cause, but not strongly opposing it; rather assuming that it would be granted, but pressing that it should be made a condition that the plaintiffs should produce their books shewing their accounts with the defendants, which Mr. Bell assented to; and the rule *nisi* to amend was made absolute on that day upon that understanding, and the plaintiffs to pay costs on amending. In consequence of this, the court gave no judgment on the demurrer which had been argued on the 16th of June.

On the 8th of December, 1852, the plaintiffs' attorney, not having in the meantime taken out any rule to amend, and not having amended or paid costs, the court, at the instance of the defendant's counsel, gave judgment for the defendant on demurrer, as the plaintiffs, by obtaining leave to withdraw their replications, had submitted to the demurrer. On the last day of this term (Hilary) Mr. Bell, the plaintiffs' attorney, applied to the court, stated that he was under the impression that the amendment might be made whenever he thought it convenient, and that no advantage would be taken of his delaying it; that he was ignorant of judgment on demurrer being given on the 8th of December; and he asked for a week's time to pay costs, and reply *de novo*, (judgment not having been actually entered on the demurrer). The court said that he must move on affidavit, which he afterwards did, and obtained a rule *nisi*.

Dalton shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The parties in this case have been long in litigation about a claim of a considerable amount, and it is desirable that they should arrive at a final decision upon the merits.

The plaintiffs' attorney alleges that he was under the impression that he was to be allowed by the opposite party to amend at his convenience, so as to have the case disposed of at the assizes in January. The defendant's attor-

ney denies any express understanding upon the subject, but does not seem inclined to act illiberally in the matter, while he is not willing to facilitate the plaintiffs' proceedings by assenting to anything irregular being done by them. We see no difficulty in the case. When the plaintiffs applied to withdraw their replications they submitted to the demurrer, and rendered it unnecessary that we should give judgment; afterwards, in December, as of Michaelmas term, they having, as the defendant's attorney considered, waived their amendment, by taking out no rule and doing nothing, the court upon application gave judgment for the defendant on the demurrer. That judgment, however, has not been yet entered of record, and whether we shall still suffer the amendment, to be made by the plaintiffs replying *de novo* is a matter within our discretion, unless the circumstance of the plaintiffs' not coming until the term after our judgment was pronounced on the demurrer creates a difficulty. We think it does not. The same thing was done in the Court of Common Pleas in England in the case of *Atkinson v. Bayntum* (1 Bing. N. C. 444, 741). The object is to advance the real ends of justice, rather than allow the parties to be precluded by a slip in pleading or in practice.

We now order that the plaintiffs may within a week reply *de novo*—paying the costs of the amendment, according to the order before made, and of opposing this application—otherwise judgment to be entered for the defendant on the demurrer; the understanding as to producing the books upon the trial must continue.

GEORGE V. THOMAS.

Evidence of marriage—Illegitimacy—Presumption rebutted.

A presumption of marriage arising from reputation may be rebutted by proof that the woman formerly lived with another man in such a manner as to raise the same presumption of marriage with him. The plaintiff having put in a will, in which the testator spoke of H. as his wife, was not estopped from denying the marriage.

Ejectment for No. 17, 8th concession; No. 7, 9th concession; and No. 7, 10th concession, of Haldimand.

At the trial at Cobourg, before *Draper, J.*, the title of one Thomas Jackson to the lots in question was established; and the plaintiff gave evidence sufficient to shew him-

self heir-at-law to one of the sisters of Thomas Jackson ; and he also put in evidence the will of Thomas Jackson, the parts of which affecting this case were—" I give and bequeath to *my beloved wife Hannah Jackson*, all right and title to the whole of my improved land,"—(not the premises in question,)—" I give and bequeath unto my daughter Margaret Jackson, as soon as she shall have attained the age of eighteen years, or is married," &c., the premises in question, "to have and to hold, occupy and enjoy, during the term of her natural life, and afterwards to her heirs forever. And should it so happen that my daughter should not have heirs, then, at her death, the whole of the freehold estate to be divided as follows:"—devising it so that a part would come to the plaintiff, as one of the sons of Thomas Jackson's sister, Catharine George. Thomas Jackson died in 1816 or 1817. Margaret, named in the will as his daughter, died without issue in 1836 or 1837. Her legitimacy was denied; the only witness called stated that Thomas Jackson was not married; that Mrs. Asselstine (named in the will as "*my beloved wife Hannah Jackson*") lived with him; that her husband was living at the time; and that Margaret was the reputed child of Thomas Jackson and Mrs. Asselstine; that Asselstine had come to live at Thomas Jackson's as a servant, bringing with him, as his wife, Mrs. Asselstine, by whom he had previously a large family; that after some time Mrs. Asselstine and Thomas Jackson went to the United States, and after their return lived together as man and wife for fifteen years; that Asselstine was living in Canada at and after the birth of Margaret, and afterwards left the province; and that the witness had heard Thomas Jackson's father speak of Thomas Jackson marrying Mrs. Asselstine.

The defendant's title was under deeds duly executed by Margaret, after marriage to one Fairfield.

The jury were directed that the presumption of marriage arising from Thomas Jackson and Mrs. Asselstine living together as man and wife, was rebutted by the presumption arising from her previously living in the same manner

with Asselstine; and that they believed she did so live with Asselstine as proved, and Asselstine was living when Margaret was born, they should find Margaret to have been illegitimate; that by the will Margaret could not convey in fee, as she took no estate in fee; and therefore as devisee, apart from his title as heir on which he had finally elected to rest, the plaintiff was entitled to recover something.

The defendant's counsel objected to the direction that the presumption of the second marriage was rebutted by the presumption of the prior marriage; and that the plaintiff having put in the will was estopped from denying the marriage, as Thomas Jackson therein called her his wife.

The jury found for the plaintiff, and that Margaret was illegitimate.

In Michaelmas Term, *Eccles, H.*, obtained a rule *nisi* for a new trial, on the ground of misdirection.

In this term, *Vankoughnet Q. C.*, and *Phillpotts* shewed cause.

DRAPER, J., delivered the judgment of the court.

At the trial I thought there was no sufficient evidence on which I could direct the jury that they could find that there had been a marriage in fact between Thomas Jackson and Hannah Asselstine; and that the only proof of such a marriage was presumptive, arising from their ostensibly living together as man and wife. If the presumption had stood unchallenged and uncontradicted, I should have left it to the jury as sufficient proof of a marriage in fact, and have directed them to find accordingly. But there was the same presumptive evidence of a prior marriage to Asselstine, with whom she lived openly as his wife, and by whom she had a family; and it appeared that Asselstine took her with him as his wife into the service of Thomas Jackson, where they continued to live some time before it was pretended she could have become Jackson's wife. The prior presumption was at least as strong as the second, upon the mere question of cohabitation and reputation; and as to the suggestion that it is not to be presumed

the woman committed bigamy, as if married to Jackson, she must have done, had she been previously married to Asselstine—the answer is, that there is no evidence of a marriage in fact between her and Jackson, and then it is equally open to the plaintiff to contend that the presumption is, she was not married to Jackson, as in that event she would have committed bigamy. *Doe Wheeler v. McWilliams*, (2 U.C.R.77) is distinguishable, on the very ground that there was in that case direct proof of the second marriage. Here no marriage in fact is proved at all. A marriage to Asselstine is established by the presumption from long cohabitation and reputation; and he lived a year or more in this province after the cohabitation between Jackson and this woman commenced, and until after the birth of Margaret their daughter, under whom the defendant claims. The plaintiff's case rested upon no presumption, for his right to recover was clear, unless the defendant could establish this alleged marriage with Thomas Jackson; and as this marriage was rested only on a disputable presumption, the presumption of a former marriage was properly receivable in evidence, and the decision of the jury is supported by that evidence.

The point of estoppel was not very strongly pressed at the argument, and has virtually been adjudged upon this very will, in the case of *Doe Anderson v. Fairfield* (3 U. C. R. 140) where the same construction was put on the devise to Margaret that was given to the jury at this trial; and where, as in the present case, Margaret's illegitimacy was established.

Rule discharged.

FOSTER V. FOSTER.

Trespass—Ejectment—Evidence.

One F. rented the *locus in quo* from the plaintiff, previous to May, 1851, when he went out, and the defendant obtained possession; the plaintiff recovered in ejectment, in which the demise was laid on the 14th of June, 1851, and entered his judgment in March, 1852; he then brought trespass *qu. cl. fr.*, alleging the trespass to have been committed on the 5th of July, 1851. The trespass proved was in May, 1851, while F. was in possession; but held, that the action was maintainable, for the recovery in ejectment entitled the plaintiff to treat the defendant as a trespasser from the day of the demise.

This was an action of trespass,—The first count was for breaking and entering, on the 5th July, 1851, and on divers other days and times between that day, &c., a dwelling house of the plaintiff, situate and being on lot No. 7, on the south side of Duke street, formerly Duchess street, in the city of Toronto, and there making a great noise and disturbance, and expelling the plaintiff and keeping him out for nine months; and forcing and breaking to pieces the doors, locks, and hinges, to the plaintiff's damage, &c. The second count was for an assault and battery of the plaintiff, on the 1st of July, 1851, and divers other days and times before the commencement, &c.

Pleas:—1. Not guilty to the whole declaration.—2. To the first count, that the dwelling was not the plaintiffs.—3. To the first count, not possessed.—4. To the second count, *son assault demesne*.

Replication, taking issue on the first three pleas, and to the last *de injuria*.

At the trial, before Burns, J., at the assizes held in Toronto, in October last, the facts proved were these:—An exemplification of judgment in ejectment between the parties to this suit was put in; wherein the present plaintiff was lessor of the plaintiff for the same premises in respect of which the present action is brought. The demise was stated to be on the 14th of June, 1851, and the judgment was entered on the 20th of March, 1852. The present defendant requested the plaintiff's attorney not to take out a writ of *hab. fac. poss.* and he would give up the possession, which he afterwards did. It was then found, that previous to the month of May, 1851, a person named Ford, rented the dwelling house from the plaintiff by the month, and paid the plaintiff during about ten months he had occupied the place. In the month of May, 1851, the defendant, who, it appeared, thought he had some title to the premises, went to the place, and finding the plaintiff there, they had a dispute, which ended in a fight between the two, who were brothers. The plaintiff, it appeared, was knocked down by the defendant, and used a shovel in striking the defendant. The neighbours at last succeeded in

separating them. Ford, the tenant, was determed not to be annoyed by the brothers quarrelling about the premises, and he rented another house. The same day the affray took place the defendant went to the wife of the tenant, and ordered them out, and again afterwards ordered them out. The day following the affray the defendant came to the place and cut down the fences; a few days afterwards the tenant moved out, and on his doing so the defendant got possession of the premises, and then the present plaintiff brought his action of ejectment. During the occupation of the premises by the defendant he put up a new fence and repaired the house.

On the part of the defendant it was contended at the trial that the plaintiff could not recover upon the first count, because it was not framed as in an action of mesne profits; and, secondly, because trespass would not lie by the plaintiff, the premises then being in the occupation of a tenant of the plaintiff. Leave was reserved to the defendant to move to enter a verdict for him upon the first count, if the court should be of opinion that a verdict for the plaintiff on that count could not be sustained.

The jury assessed damages upon the first count at £3, and upon the count for assault and battery they found in the plaintiff's favor, with 1s. damages.

During Michaelmas Term last *Hagarty*, Q. C., obtained cause why there should not be a new trial generally, in consequence of the erroneous finding for the plaintiff upon a rule according to the leave reserved, and further, to shew the issues joined upon the first count. He cited *Cox v. Glue*, 5 C. B. 533; *Pilgrim v. Southampton & Dorchester R. R. Co.*, 18 L. J. (C. P.) 330; *Rex v. Watson*, 5 East. 485; *Bertie v. Beaumont*, 16 East. 33; *Roscoe N. P.* 485.

Bell shewed cause, and cited *Holcomb v. Rawlins*, Cro. Eliz. 540; *Molloy v. Stansfield*, 3 U. C. R. 390 *Holmes v. Wilson*, 10 A. & E. 503; *Hudson v. Nicholson*, 5 M. & W. 437.

BURNS, J., delivered the judgment of the court.

The plaintiff has not strictly framed his declaration to enable him to recover the annual value or proportionate part

thereof, for the time he was kept out of possession of the premises; but he has framed it as for a continuing trespass during the whole time he was so kept out. No evidence was given as to the annual value of the house, or what benefit the defendant might have derived from either occupying it himself or letting it to others; and probably the evidence was not tendered, for the reason that the declaration was not framed so as to meet it. The damages in ejectment being nominal before the recent statute, were recovered for the ouster only, and not for the continuance of the trespass. The plaintiff in the action of trespass may either confine his demand to the time of the demise laid in the declaration in ejectment, or may go back to the time of disseizin at any time within six years. In this declaration the plaintiff has laid the time of the first committing of the trespass to be the 5th of July, 1851, subsequent to the time of the demise in the ejectment. Both the plaintiff and defendant's counsel treated the case at *Nisi Prius* as depending in some measure upon the fact of the defendant having cut down the fences as establishing on the plaintiff's part a claim to damages; and on the part of the defendant, that this act was done while there was a tenant in possession, the plaintiff could not maintain trespass. They have now argued it in that point of view. The plaintiff relies on *Molloy v. Stansfield* (2 U. C. R. 390) to establish that he may shew a trespass anterior to the time laid in the declaration, and the defendant relies on *Pilgrim v. Southampton & Dorchester R. R. Co.* (18 L. J. C. P. 330) to prove that, as the trespass was committed by the defendant while the premises were in the occupation of a tenant, though the tenant left, yet the proprietor could not maintain trespass. Both parties seemed to have overlooked the fact that the destruction of the fence is not complained of in the declaration; and indeed the fact could have had little effect upon the jury, because it was proved that the defendant immediately after cutting down the fence put up a better one, which the plaintiff got ultimately. The question is, whether the position established in the case of *Pilgrim v. Southampton & Dorchester R. R. Co.* has any bearing upon

this case. It is quite clear it cannot have any because the judgment in ejectment, the title not being controverted by the defendant, establishes that under any circumstances the defendant was a trespasser on the 14th of June, 1851, and from that time, undoubtedly, the plaintiff was entitled to recover some damages for the injury; though it was established that the first trespass was committed at a time when the plaintiff was out of possession, yet upon the recovery in ejectment the defendant became a trespasser by relation to the day of the demise. Can the case then be affected by the plaintiff proving that a trespass in fact—that is, the taking of possession anterior to that time by the defendant—took place while the premises were in possession of a tenant? It did not appear whether the tenant's month was up just at the time he left, or when the tenancy would expire. If the tenancy had expired, then the plaintiff would by operation of law be considered to be in possession, and if the defendant entered afterwards, that act would be a trespass on the plaintiff. The tenant's abandoning the premises, and in fact giving them to another, who acts as a disseizor of the plaintiff, cannot be viewed in any other light than a trespass on the plaintiff from the time of the expiration of the tenancy. Neither party proved the exact time, but the plaintiff being driven to ejectment, and having recovered his right to the possession, that in law establishes his possession by relation back to the time of the expiration of the tenancy, and from that time the defendant was a trespasser.—*Vide Hey v. Moorhouse* (6 Bing. N. C. 52.)

The rule obtained by the defendant should therefore be discharged.

Rule discharged.

RISCHMULLER ET UX. V. UBERHAUST.

Amendment at Nisi Prius.

Where in an action of assumpsit the wife of the plaintiff was improperly joined. *Held*, that the judge at Nisi Prius had no authority to allow an amendment of the record by striking out her name.

Assumpsit on the common counts for money lent, and on account stated, with a count for money lent to the defendant by the wife of the plaintiff during coverture. *Pleas*:—*non-assumpsit*, and set-off. At the trial at Goderich, before McLean, J., it appeared that the defendant had come from Germany, and was hired for a few months to the plaintiff, when he desired to return to Germany and bring out his family; and Mrs. Rischmuller lent him £75 to enable him to do so. He returned to this province, and lived again a short time with the plaintiff; and, on being applied to for the money, set up as a defence that he was never expected to repay it, and that it was intended as a present.

The undertaking which he gave on receiving the money was produced on the trial, and was in these words: "I, the undersigned, owe Mrs. Charlotte Rischmuller, at Stratford, the sum of three hundred dollars. June 19th, 1849." No explanation was given at the trial as to whether this money had been at any time the peculiar money of the wife, or why the writing had been taken in her name. It was objected that she was improperly joined in the action, and that the plaintiff should therefore be nonsuited. The learned judge, in order to cure the objection, allowed an amendment to be made in the record by striking out the wife's name.

Cameron, Q. C., moved for a new trial on the ground that the amendment was improper.

Cooper shewed cause, and cited *Stansbury v. Matthews*, 7 Dowl. 234 M. & W. 343 S. C.

ROBINSON, C. J., delivered the judgment of the court.

No authority has been produced warranting such an amendment at Nisi Prius. It clearly does not come under our statute of 7 W. IV. ch. 3, and the case of *Cowper v. Whitehouse* (6 C. & P. 546) is expressly against it.

Rule absolute for new trial without costs.

SMITH V. MCKAY.

Malicious arrest—Evidence—Three perverse verdict's.

In an action for malicious arrest the court granted a third new trial, three verdicts having been perversely rendered against the defendant. *Heid.*, that upon the evidence stated below the case should not have been given to the jury as one in which they had a duty to perform, which might lead them to find a verdict one way or the other; but that it should have been ruled by the learned judge, that the case failed, for that probable cause was shewn to his satisfaction of which the law required that he should be the judge.

CASE for maliciously causing the plaintiff to be arrested on mesne process—tried at Toronto, before Burns, J.

The declaration contained two counts.

1. For arresting for £101 8s. without having any reasonable or probable cause of action against the plaintiff to that amount. 2. For causing the plaintiff to be arrested, when he had no reasonable or probable cause for believing that the plaintiff was immediately about to leave Upper Canada with intent to defraud him of his debt.

Plea: Not guilty,—(and other pleas not material to be noticed). Verdict for the plaintiff, 100*l.*

Eccles moved for a new trial on the law and evidence, for misdirection, and on grounds disclosed in affidavits filed.

An affidavit was made by the defendant, stating that since the trial he had discovered that one McLeod could give material evidence for him, and that he was not aware till after the trial that he could give such evidence.

McLeod also made affidavit, that on the day on which the plaintiff was arrested, he, the deponent, was in the defendant's office, where he was preparing to accompany the sheriff's bailiff to make the arrest; when a person with whom the deponent was not acquainted, came in and informed the defendant that he had better hurry himself, as the plaintiff was then leaving; and that if he lost time in pursuing him he would escape; that on receiving this information, this defendant immediately set off with the bailiff, and borrowed from the deponent a muffler and some money to prepare himself to follow the plaintiff to Hamilton.

Bell shewed cause.

The facts of the case are stated in the judgment of the court, delivered by

ROBINSON, C. J.—This case has been three times tried, and a verdict rendered on each occasion for the plaintiff (a). On this last occasion the evidence was in substance much the same as on the former trials, though it seems to us to have supplied even stronger ground for holding that by the plaintiff's evidence want of probable ground for the arrest was not shown, which in such an action is an indispensable part of the plaintiff's case.

As to the complaint in the first count, that the plaintiff caused the defendant to be held to bail for 101*l.* 8*s.*, when he had no probable cause of action against the plaintiff to that amount, the learned judge considered that in that respect there was not want of probable cause, for that the plaintiff arrested the defendant for the principle and interest due upon a note which the defendant had given to him, and that he had reasonable ground for arresting for that amount, for no part of it had then been paid. A subsequent arbitration had resulted in an award, shewing that in the opinion of the arbitrator, 78*l.* was at the time of the arrest the amount which this defendant could justly claim as due upon the note. The plaintiff had taken a farm from the defendant on lease, and it was agreed between them that the plaintiff should take a crop of oats on the place, which was not yet harvested, and some hay in stack, and a quantity of manure, which altogether the defendant estimated at 95*l.* for which sum the defendant gave his note. This note the defendant endorsed, and got discounted at a bank, upon an understanding with the plaintiff that when it became due the plaintiff would pay 30*l.*, and the defendant would endeavor to get it renewed. Before the note fell due they quarrelled, and the plaintiff refused to pay anything, alleging that the oats and hay, which he had in a great part sold and consumed, had fallen short of the estimated quantity; that the manure was over-charged; and that the understanding was that they were to be valued before the plaintiff should be obliged to pay for them. The defendant on his part denied that the payment of the note was to be dependent on any such valuation, which could

(a) See the judgment on the last rule, ante 412.

not well be made after the articles had been disposed of; and at any rate, he contended that the plaintiff could have no excuse in what he stated for refusing to pay the instalment of 30*l.* upon the note. The plaintiff did refuse, however, and being determined apparently that the bank should not make good their recourse against him, began removing his goods in a clandestine manner, and afforded ample reason for the defendant to conclude that he was about to withdraw himself as well as his effects. The defendant in the mean time, being liable to the bank on the note, was obliged to take it up, which he did, and then took his remedy against the plaintiff as the maker—as he had refused to do anything upon it, and had left the defendant to pay the whole, though he had been selling the property which that note was given to pay for, and was collecting the money due to him upon it from a person to whom he had sold, with a resolution, as any one in the defendant's situation could not but believe, of evading all means of compelling payment. The defendant, having taken up the plaintiff's note, arrested him upon it for the full amount, there being no specific portion of it that could be shewn, by anything that had taken place since it was given, not to be due. The plaintiff was himself examined in support of his action, and much evidence was given, on both sides. At the conclusion of the case, the learned judge told the jury that he thought the plaintiff had wholly failed in proving a want of reasonable and probable cause for the arrest, and that without that this action could not be sustained. The jury, however, found 100*l.* for the plaintiff.

We agree in the conclusion which the learned judge came to at the trial. On the plaintiff's own account of the transaction there was reasonable ground for the arrest; and on the whole evidence, it appears to us that the conclusion was irresistible, that the defendant had not acted without probable cause. It is of the utmost importance that parties should be protected to a fair extent in pursuing their civil remedies as well as in prosecuting for offences committed, or which they believe to have been committed, against them. While the law stands as it now is, the court has the duty

incumbent upon it of seeing that the respective functions of the judge and of the jury in such actions are kept distinct. The case of *Panton v. Williams* (2 Q. B. 169), determined in error, lays down clearly the principles which should govern us in these cases. Looking at the principles there laid down and the evidence which was before the learned judge who tried this case, we think he had good ground for holding it to be clear, as he did, that want of probable cause was not shewn. That being then the clear impression on his mind, not derived from conflicting evidence, which might preponderate one way or the other, according as this or that witness was believed, which would leave questions open for the jury, but regarding the facts which were not disputed, and which received the strongest confirmation from the plaintiff's own testimony, we think the case should not have been given to the jury as one in which they had a duty to perform, which might lead them, according to their view of the case, to find a verdict one way or the other; but that it should have been ruled by the learned judge that the case failed on the want of proof that the defendant acted without probable cause, for that probable cause was shewn to his satisfaction of which the law required that he should be the judge. It is very probable that the learned judge did deliver the case to the jury in such a manner as to convey this impression distinctly enough, but that a non-suit would not have been accepted if it had been urged, the plaintiff preferring to go to the jury upon the law as well as the fact, and trusting that they would differ from the learned judge upon a point which it rested with him to determine, and not with the jury. In any case of that kind we have but one course to pursue, such as was taken by the court in *Pochin v. Pawley* (1 W. Bl. 670), where a farmer brought an action against a surveyor of highways upon an alleged contract, when in truth his remedy was against the commissioners of highways, or their treasurer, and not against the surveyor with whom there was no contract. Mr. Justice Aston would have nonsuited the plaintiff, but he refused to be nonsuited, and a jury of farmers gave a verdict in his favor though

they were told it would be contrary to law. The court being of the same opinion upon the case as the judge who tried it, as the plaintiff had refused to be nonsuited contrary to the opinion of the judge on the question of law, granted a new trial without costs. We feel that if we were to do less in this case, we should be withholding from the defendant the justice that he is entitled to.

Rule absolute.

**FISHER ET AL V. JOHN TRUEMAN AND HIS WIFE JANE TRUEMAN,
AS EXECUTRIX OF JOHN T. ANDERSON, DECEASED.**

Action against executrix—Plene administravit—Amount of verdict—What are assets.

Assumpsit against an executrix. Plea—Plene administravit. Assets were admitted to an amount less than the claim. It was proved that the testator had joined one M. in giving a note for the price of a carding machine, which M. was to hand over to him in order to save him harmless. This was not done, but after the testator's death defendant got the machine from M. to hold as security against the note. It was also proved that there were crops in the ground at the testator's death.

Held, 1. That the verdict should be only for the value of the assets proved, and not for the amount of the debt.

2ndly. That the carding machine would not form assets.

3rdly. That the crops would be assets, in the absence of any evidence as to the contents of the will.

ASSUMPSIT on three several notes of hand made by the testator, payable to the plaintiffs in one, two, and three years respectively, each note being for £38 12s. 2d.; with common money counts.

Pleas—1. As to £37 10s. of the money claimed in the first count, payment before action.—2. as to the residue of that count and the other three counts, that Jane Trueman had fully administered (a plea of *plene administravit* in the usual form, averring that the defendants had no assets in their or either of their hands.)

The plaintiffs abandoned any further claim on account of the £37 10s. mentioned in the first plea. To the second plea they replied that at the commencement of this suit the defendants had assets sufficient to satisfy, &c., concluding to the country.

At the trial at Guelph, before Sullivan, J., assets were admitted to the amount of £30 5s. It was sworn that there

were crops growing in the ground at the time of the testator's death; but the learned judge, considering that they would not go to the executrix, no evidence was gone into as to their value; nor as to whether the land was devised by the testator or not, or the particulars of any such devise.

The chief contest was about a certain carding machine, which one McIlroy had purchased from some third party in the life-time of Anderson, the testator, who had joined McIlroy in giving a note to the seller for the price. McIlroy engaged that he would turn over the carding machine to the testator to save him harmless against the note, but he never did so in fact. Since Anderson's death, McIlroy gave the widow and executrix an order upon a person who had the machine in charge for him to deliver it to her, stating that he had sold it to her. The intention was to secure her against loss by reason of the note which the testator had given. She obtained possession of the carding machine.

It was admitted by the defendants that the machine was of sufficient value, added to the £30 5s. for other assets proved, to pay the whole of the plaintiffs' claim. And the plaintiffs contended at the trial that on the issue on this record, if the plaintiffs proved any assets, they should receive a verdict for their whole debt. And 2ndly, that under the facts proved, the carding machine was assets of the estate. The defendants contended, that on the issue joined on the plea of *plene administravit* the jury must find only the amount of the assets proved; and that the carding machine, delivered as it had been into the possession of the executrix merely as security against possible damage, did not form assets. The plaintiffs called witnesses, and endeavoured to prove other assets exceeding the £30 5s. admitted, but failed to do so to the satisfaction of the jury. And the learned judge,—having left that fact to the jury, and discarded any claim on account of growing crops—reserved for the opinion of the court whether the carding machine should be held to be assets. If so, then the plaintiffs should recover their whole demand, which was shown to be £115 10s. 6d.

With this understanding, a verdict was taken for £115 10s. 6d. damages, subject to leave to move to reduce it to such sum as the court might think right, upon the evidence, "either party to be at liberty to move." No motion was made in the following term,—but in this term *Vankoughnet*, Q. C., for the plaintiffs, obtained a rule *nisi* that a verdict be entered for the plaintiffs for such other sum as the court should name, pursuant to the leave reserved at the trial.

M. C. Cameron shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think it clear upon the evidence that the carding machine does not form assets of the estate. If the administratrix is compelled to pay the note, and obtains repayment through the carding machine, the money obtained would become assets. The growing crops may or may not be assets, according to the contents of the testator's will, which is not in evidence. Under ordinary circumstances they go to the executor, and not to the heir; but if the land on which the crops were growing was devised by the will, that would in general make the crops go with the land.

We think the verdict should be for the amount of assets proved only, supposing them to be less than the demand proved (a).

If the value of the crops, when added to the £30 5s., would be sufficient to cover the plaintiffs' verdict for £115 10s. 6d.; or if the value of the crops was proved at the trial, which does not appear on the learned judge's notes, or the parties can fix upon the value amicably, they will be able to adjust the verdict without the necessity of another trial, provided the contents of the will are not such as to raise any question upon the growing crops being assets. If, with these explanations, the parties cannot come to an arrangement as to the amount for which the verdict should be entered, as it is out of our power to do it upon the evidence before us, there must be a new trial with costs to abide the event.

(a) See *Jackson v. Bowley*, C. & M. 97.

RUTTAN V. VANDUSEN.

Practice—Time for appealing from County Court.

Quære as to the construction of the 57th clause of 8 Vic. ch. 13—whether an appeal from a county court must be set down for argument at the next term after judgment delivered below, or after the judge shall have certified the proceedings.

This was an appeal from the County Court of the united counties of Northumberland and Durham.

Leith for the appeal; *Wilson, Q. C.*, contra.

The court were of opinion that there was nothing in the evidence returned which could warrant the verdict given for defendant, but as it appeared that £20 out of the £25 sued for had been paid, and as it was not shewn that the judge's charge was objected to at the trial, they refused to entertain the appeal.

It was objected, besides, that the appeal was too late, and on this point the following remarks were made by the Chief Justice in delivering the judgment of the court:—

“An objection too has been taken to the lateness of this appeal on the ground that by the 57th clause of the 8th Vic. ch. 13, the appeal must be moved in before the next term. That depends on whether the words in that clause, whereupon the same matter shall be set down for argument *at the next term* of the said Court of Queen's Bench,” have reference to the term next after the judgment was given that shall be appealed from, or next after the judge shall certify the proceedings. It would seem absurd that the legislature should intend that the parties should have an unlimited time for appealing, and should yet require that no delay shall take place in acting upon the appeal. The grammatical construction, however, seems to apply to the time of entering the appeal for argument, rather than to limit the time for appealing, though there is room for contending otherwise; and we believe it has been generally considered in practice that the appeal must take place before the following term.

“Considering that little but the costs seem to be at stake, and that the party has so long delayed his appeal, and that we do not see that the charge was objected to at the trial, we are of opinion that the appeal should be dismissed with costs.”

Appeal dismissed.

EASTER TERM, 16 VIC.

Present :

THE HON. JOHN BEVERLY ROBINSON, C. J.

“ WILLIAM HENRY DRAPER, J.

“ ROBERT EASTON BURNS, J.

BAKER v. THE MUNICIPAL COUNCIL OF PARIS.

Rules for regulation of inns—Authority of Municipal Council—Proof of by-law—Affidavit of applicant—Addition.

Upon motion to quash the following rules prescribed in a by-law :

6. “Every inn-keeper shall shut up his bar-room, the outer as well as the inner doors, each night at eleven o’clock, and keep them closed during the night, except on Saturday night, when they shall be closed at the same hour, and not opened again until four o’clock on Monday morning, except for the entrance of himself or servant—*during which time no spirituous or intoxicating liquors are to be sold or furnished to any one.*”

7. “If any dispute shall arise between the guests and the inn-keeper, it shall be referred to any justice of the peace, whose decision shall be final as to the *quantum* of the charge, by his verbal order.”

Held, that the Municipal Council had no power to make the order as to spirituous or intoxicating liquors contained in the sixth rule, and that the seventh rule was also an enactment beyond their authority.

Where the seal of the corporation was not mentioned in the clerk’s certificate, but was on the same page with the certificate, just above it, and opposite to the signatures of the reeve and clerk—the by-law was held to be sufficiently proved.

The affidavit of the applicant stated him to a rate-payer, and a resident householder, and that he obtained the copy of by-law from the clerk. *Held*, not necessary to give any further addition of deponent.

Read obtained a rule nisi to shew cause why their by-law 31, or the sixth and seventh of the rules which are incorporated in it, should not be quashed, with costs—on the ground, as to the sixth rule or regulation, that it is not authorized by law, and is an infringement of the rights of her Majesty’s subjects, and is contrary to law ; and as to the seventh regulation, that it is contrary to law, and is not authorized by any statute ; as it assumes a right to compel parties to refer their disputes to a tribunal different from

that to which they have a right to resort for redress ; and that it is uncertain, and makes a justice's order final in cases not authorized by law ; and is in other respects defective and illegal.

The by-law recited that it was expedient and necessary to pass a by-law for the regulation and licensing of inns, taverns, temperance houses, and other houses for the reception and entertainment of the public, and also to prescribe the duties of inspectors. It enacted several things to which there could be no objection, and then prescribed a body of rules, seven in number, to be observed by all persons obtaining a license for any of the purposes aforesaid. The sixth rule, which was moved against, ran thus : " Every inn keeper shall shut up his bar-room, the outer as well as the inner doors, each night at eleven o'clock ; and keep them closed during the night, except on Saturday night, when they shall be closed at the same hour, and not opened again until four o'clock on Monday morning, except for the entrance of himself or servants, *during which time no spirituous or intoxicating liquors are to be sold or furnished to any one.*

The seventh rule was : " That if any dispute shall arise between the guests and the inn-keeper, it shall be referred to any justice of the peace, whose decision shall be final as to the quantum of the charge, by his verbal order."

M. C. Cameron shewed cause. He objected—1st. That the copy of the by-law was not duly authenticated, as required by the statute 12 Vic. chap. 81, sec. 155, for that the clerk's certificate was not given under the seal of the corporation.

And, 2ndly. That in the affidavit of the applicant, which stated to him to be a rate-payer and a resident householder in Paris, and that he obtained this copy of by-law from the clerk—that his addition was not given in the affidavit ; that is, no addition of mystery, trade, or degree—*Jarret v. Dillon*, 1 East. 18 ; *D'Argent v. Vivant*, Ib. 330. He also argued that, under 13 & 14 Vic. chap. 65, sec. 4, the municipality had power to make the sixth rule.

ROBINSON, C. J., delivered the judgment of the court.

As to the first objection, we think the direction in the act is sufficiently complied with. The seal of the corporation is not mentioned in the clerk's certificate, but it is on the same page with the certificate, just above it, and opposite to the signature of the reeve and clerk. We think also, that we should be needlessly embarrassing the proceedings in these cases if we were to hold that the deponent in this affidavit is not sufficiently described.

As to the exceptions which have been urged against the by-law, we think that under the general authority committed to municipal councils by the statute 13 & 14 Vic. chap. 65, sec. 4, to regulate inns and houses of public entertainment, they might legally ordain, as they have done in the by-law complained of, that the bar-room shall be closed each night at eleven o'clock, and kept closed during night; and that the bar-room shall continue closed till four o'clock on Monday morning. The effect of that is to close the bar-room as a place of public resort during the time specified, which we think is a salutary regulation, and not unreasonable, for it does not prevent travellers, who may of necessity come within those hours, from obtaining all such refreshments in the inn as they can obtain at other times. The only effect is that they cannot, any more than others, remain tipling in the bar-room; they must take what they may have occasion to eat or drink in another room; and the same by-law provides that there shall be in any licensed inn at least two sitting rooms. The inn-keeper too, continues under the same legal obligation as before, notwithstanding this provision, to provide everything needful for travellers and guests at all times.

But there is more to be considered as regards the last clause in the sixth rule, which provides that during the times of the bar-room remaining shut up, as it is required to be by that rule, "no spirituous or intoxicating liquors are to be sold or furnished to any one." This renders it impossible for any traveller, or any guests, to obtain any spirituous or intoxicating liquor after eleven o'clock on any night, or on the Sunday. A traveller may come, cold and

weary, to an inn after eleven o'clock at night : his travelling at that hour is not against law, and may be unavoidable, and he may stand in need of refreshment ; and so a traveller or a guest may, on the Sunday, require refreshment. "*Intoxicating liquors*" is a comprehensive term, including, as I suppose, wine, all malt liquors, cider, and most cordials, since these will intoxicate if taken in excess. The legislature may prohibit the use of these, perhaps, if they think the balance of good will be in favour of it, but no discretion of that kind, in our opinion, is delegated to these corporate bodies. If they can prohibit their being given to *any one* after eleven o'clock at night, or on a Sunday, they can equally prohibit their being given to any one at any other hour, or on any other day ; and if they can prohibit the use of these things in an inn, they can equally prohibit the use of any other article of food or diet, for there is at present by the general law of the land no prohibition of the kind. To allow municipal corporations to prohibit the use by any one of what the law does not prohibit, though only at certain times, would, we apprehend, be found inconvenient in its effects, for there might be as many different regulations as there are different municipalities. Some might be for taking a much wider range in their restrictions than others ; and if there is to be a discretion recognized of prohibiting at all, there could be no clear and satisfactory line that we could draw as to the extent to which they might carry their prohibitions. They must leave such matters, we apprehend, to be dealt with by the legislature. It is within their authority to regulate the hours within which persons may continue tippling in a bar-room, but we do not consider it to be within their authority to enact that on any day, or at any hour, when a guest or traveller is at liberty to obtain refreshments, he may not obtain any ordinary kind of diet or refreshment which the law of the land allows him to purchase at an inn, and to use them in moderation, so long as he does not disturb the peace and violates no law. These defendants, we have no doubt, have passed this by-law with the best intentions, but we think they have stretched their power

further than is reasonable or lawful. The cases of the *Calder Navigation Company v. Pilling* (14 M. & W. 87), and of *Elwood v. Bullock* (6 Q. B. 383), shew the caution which the courts of England feel it incumbent on them to exercise in preventing any unreasonable or unwarrantable extension of the legislative power committed to municipal bodies, and in taking care that the authority to alter the law of the land in matters of general application shall be confined to the supreme legislature.

The seventh rule inserted in the by-law, we are of opinion, is altogether illegal, and beyond the power of the council to enforce. It is in its nature very unreasonable and objectionable, for it obliges the inn-keeper and his guests to abide by the decision of any justice of the peace, who shall determine finally as to the *quantum* of the charge by his verbal order. The council cannot in this way take from persons their recourse to the tribunals of justice, however expedient the legislature might think it to be to enforce upon parties such a summary method of settling their differences. It is not provided who is to select the justice, and no redress is afforded against any interested appointment, or any partial decision, however unjust. The council are taking upon themselves, by this regulation, to create a new court.

We are of opinion that that part of the by-law complained of which provides that no spirituous or intoxicating liquors shall be sold or furnished to any one at an inn after eleven o'clock at night, during the night, nor between eleven o'clock at night on Saturday night, and four o'clock the Monday morning following, must be quashed; and also, that part of the said by-law, being numbered as the seventh rule for regulation of inns, which provides that if any dispute shall arise between the guests and the inn-keeper, it shall be referred to any justice of the peace, whose decision shall be final as to the *quantum* of the charge by his verbal order.

Rule accordingly.

SUTHERLAND V. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF EAST NISSOURI.

Nature of objections for which by-laws may be quashed—12 Vic. ch. 81, secs. 155, 168, 192.

The court has no authority to quash a by-law, on application, except for something illegal appearing upon the face of it; or except, perhaps, where it is shewn to have been passed under circumstances which by the express terms of the statute make it illegal—They, therefore, refused to interfere with a by-law, on the ground that a quorum of the Council was not present at its passing, as required by 12 Vic. ch. 81, sec. 168.

Read, on the first day of Hilary term last, obtained a rule nisi to quash a by-law of this municipality, on the ground that there was not a quorum of the council present when it was passed; and that it was not carried by the majority of votes of the persons composing the meeting of council other than the person presiding, within the meaning of the 168th section of the statute 12 Vic. ch. 81; and on other grounds disclosed in the affidavits and papers filed.

The rule was sworn to have been duly served on the clerk of the Municipal Council on the 10th of February, and on the Reeve the same day.

The by-law was passed on the 2nd of October, 1852—No. 14; and was entitled, "A by-law for levying and collecting a tax of one penny and a half-penny in the pound on all rateable property in the township of East Nissouri, for township and local purposes; and for levying and collecting certain moneys for school purposes mentioned therein."

Three of the municipal councillors for 1852, made oath that they did not concur in passing this by-law. It appeared from the affidavits that one of them, McIntosh, was absent in Lower Canada on the 2nd of October; another, Swayze, was not present at the meeting; that Donald McDonald (the Reeve,) Dennis Horseman, and William Sutherland, the other three, were present when Dennis Horseman proposed the by-law, or rather a resolution to grant 200*l.* for local improvements, which was to form part of it, and which was embodied in this by-law; that Sutherland objected to it, and it was not seconded, but the Reeve declared it carried, whereupon he, Sutherland, left

the meeting, and did not return, and attended no other meeting of the council afterwards.

The by-law was read three times, and passed on the 2nd of October.

ROBINSON, C. J., delivered the judgment of the court.

No cause has been shewn against this rule, but we are not the less called on to consider the propriety of the interposition desired. We can have no doubt that the by-law was illegally passed, if the facts sworn to be true, and they have not been denied. The 168th clause of 12 Vic. ch. 81, which directs by what number of members measures may be carried at corporate meetings, seems to remain unaltered by the latter statutes; and certainly it is quite repugnant to that clause that one councillor and the reeve, or presiding councillor, should take upon themselves to make a by-law—the majority of the council being absent. Then comes the question—which is one very material to be considered—what should be the consequence of their having passed this by-law in this illegal manner.

One consequence is very clear—that it is a void proceeding, and must be so pronounced if the legality of any act done under it should come to be questioned. It is desirable too, no doubt, that any by-law which, like that in question, was intended to have an important operation, should not be allowed to go into effect, or that it should without delay be rendered inoperative, for otherwise much inconvenience might follow. It has been assumed that this court can act in such cases under the authority of the 155th clause of the Municipal Council Act, as well as in those where there is something illegal on the face of the by-law itself. We have on several occasions intimated a doubt on that point. The language of the clause seems to me to be confined to cases of illegality in the contents of the by-law. It directs that any person interested in the provisions of a by-law may obtain a certified copy of it, and may move the court, *upon production of such copy*, to quash the by-law; and that *if it shall appear to the court*, that such by-law is *in the whole or in part illegal*, they may order

it to be quashed in the whole or in part, and may award costs in favor of the corporation or against them.

This provision does not seem to contemplate the case of a by-law complained of on grounds wholly apart from the nature of its provisions, and referring to something irregular in the manner of passing it.

Then, if the power to deal summarily with by-laws upon this latter ground is not given to the courts by the statute, we have to consider whether we have such an authority on principles of the common law. We find nothing express in favor of such jurisdiction, but much against it. It is true that it is clearly held in respect to such corporations as these—not being eleemosynary or ecclesiastical corporations, which are subject to visitation in another manner—the king by his courts of justice exercises a controlling power, and can keep them within the bounds of their charter; but the method of exercising that jurisdiction is the question. It is laid down that the Court of Queen's Bench, in England, interposes by writ of *mandamus* and information in the nature of a *quo warranto*; and of course when in the course of legal proceedings claims are advanced, or defences attempted to be supported, under by-laws or acts of corporations, the court pronounces on their validity incidently. A by-law illegally passed can afford no protection for what has been done under it, and so incidentally its validity may be decided upon at common law in the common law courts; but the power of dealing summarily with the by-laws of municipal bodies, and setting them aside on motion, depend wholly on our statute. Now, if what is here moved against as a by-law was really not passed by a municipal body competent to pass any by-law, then it is not a by-law any more than it would have been if the clerk or any stranger had affixed the corporate seal to a paper purporting to be a by-law, but which had never been seen by the council. In the case of *Lafferty v. The Municipal Council of Wentworth and Halton* (8 U. C. R. 232) we intimated that we might be properly called upon perhaps to quash a by-law, not for any matter appearing upon the face of it, but for matter shewn *aliunde*: as that

the by-law was made for a purpose directly prohibited by statute, in a manner in which the statute says it shall not be lawful to pass a by-law. The opinion, however, was only given incidentally, for the court in that case did not set aside the by-law; and there is a clear distinction between cases coming under the 192nd clause of the Municipal Act, and those coming under the 168th clause. The former clause enacts that it shall *not be lawful* to pass a by-law under certain circumstances, or for certain purposes. The 168th clause, which applies to the case now before us, contains no such negative words, but merely prescribes in what manner the proceedings are to be conducted.

Whether, with respect to either description of cases, this court may and should exercise the jurisdiction in a summary manner of quashing a by-law, may require to be more maturely considered; but we do not see our way clear in quashing a by-law on motion on account of irregularity in the proceedings, and especially in a case like the present, where the by-law has really not been passed by a vote of the municipal body, and so is no by-law. It might lead to great vexation if we could be called upon in every case to determine summarily upon the regularity of the manner of passing every by-law, upon a motion by any one to quash it, though he may be in no manner affected by its provisions, and though no attempt may have been made to enforce it.

If the legislature, however should think that the balance of public advantage is in favor of admitting such a summary interference on grounds having no reference to the contents of the by-law, the desirable course would be to make such an alteration of the 155th clause as would shew that to be the intention.

It is true that under the 155th clause we have possession of the by-law; but that is for a particular purpose; viz., to determine on inspection of it whether it is wholly or in part illegal; and for other purposes it does not appear to us that we have clearly a power of summary interference, except, perhaps, where is shewn to us that the by-law has been

passed under circumstances which by the express terms of the statute make its illegal.

Rule absolute.

SLATER V. SMITH ET AL., EXECUTORS OF SMITH.

Statute of Frauds—*Whether agreement not to be performed within a year.*

The plaintiff declared that one B. S. on the 1st of June, 1839, in consideration that the plaintiff would convey to him a certain lot of land, agreed with the plaintiff "that he the said B. S., his executors or administrators, would well and sufficiently provide, furnish and supply the plaintiff with good and sufficient food, board, washing and lodging, during the term of the natural life of the plaintiff."

Held, not an agreement within the fourth section of the Statute of Frauds, as by its terms it would not necessarily endure beyond a year.

The plaintiff declared in assumpsit, setting out that on the 1st of June, 1839, Benjamin Smith, in consideration that the plaintiff would convey to him in fee all his interest and estate in lot No. 6, in the 7th concession of Eramosa, of which the plaintiff was then owner, agreed with the plaintiff, "that he, the said Benjamin Smith, his executors or administrators, would well and sufficiently provide, furnish, and supply the plaintiff, with good and sufficient food, board, washing, and lodging, during the term of the natural life of the plaintiff." He then averred that he did, on the day and year aforesaid, convey the land to the said Benjamin Smith, the testator, which conveyance the testator accepted in satisfaction of the plaintiff's part of the agreement; that although the testator did from the time of making the agreement, and the conveyance of the land, to the 4th of September, 1846, well and truly perform his agreement, yet that he did not nor would from that time up to the death of the testator (on the 1st of December, 1851,) provide the plaintiff with good and sufficient food, board, &c., and that his executors had not done so since his decease—notwithstanding a request made by the plaintiff to the testator in his life-time, and after his decease (to wit, on the 10th of December, 1851,) to his executors, and on divers other days, &c.

The defendants pleaded.—1. That the testator did not promise, &c.

2. Performance by the testator in his life-time, and by the defendants since his death.

At the trial at Hamilton, before Burns, J., there was verbal evidence given that the plaintiff came to the testator's house in an ill state of health, and remained there several years. Then the plaintiff conveyed to the testator the two hundred acres of land mentioned in the declaration, and gave him also some promissory notes which he held against other parties. On one side it was sworn that the testator agreed, in consideration of these, that he would maintain the plaintiff during his life. On the other side it was sworn that the land was taken in security for what had been furnished already; and that the agreement was that if the plaintiff should recover, and should pay for his board and the trouble which the testator had had with him, then he was to have his land back, otherwise the testator was to retain it.

The receiving of any parol evidence of the agreement was objected to by the defendant's counsel, on the ground that the agreement not being to be performed within a year, the Statute of Frauds required a writing. The learned judge received the evidence, requiring leave to move on the objection. The jury found that the verbal agreement was, that the testator should maintain the plaintiff during his life, and they gave £20 damages.

Connor, Q. C., for the defendants, moved that a verdict be entered in their favor upon leave reserved at the trial; or that a new trial be granted, on the ground that the verdict was contrary to law and evidence. He cited *Gilbert v. Sykes*, 16 East 150; *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 20.

Freeman shewed cause, and cited *Souch v. Strawbridge*, 2 C. B. 808; *Boydell v. Drummond*, 11 East 142; *Wells v. Horton*, 4 Bing. 40; *Miles v. Bough*, 3 Q. B. 848; *Fenton v. Emblers*, 3 Burr. 1278; *Donellan v. Read*, 3 B. & Ad. 899; *Bracegirdle v. Heald*, 1 B. & Al. 722.

ROBINSON, C. J., delivered the judgment of the court.

I think it is evident from what is said by Lord Holt, in *Smith v. Westall* (1 *Ld. Raym.* 317), that his lordship would

have held that the contract set up here is one which required to be proved by writing under the 4th section of the Statute of Frauds, as being an "*agreement not to be performed within the space of one year from the making thereof.*" And I must say that I think the reasonable construction of that clause of the statute, and a just consideration of what the legislature must have intended to guard against by that provision, are in accordance with Lord Holt's view, though he was over-ruled by his brother judges, who seem to have held the opinion that unless by the alleged agreement something is provided to be done at a period beyond a year from the making of the agreement the case is not one to which the enactment applies. That seems reasonable enough when applied to cases of a certain class, as, for instance, an agreement to pay a sum of money on the arrival of a ship, or to A. B. when he marries, because there it might be said that parties, for all that appears, were not looking to anything that was to happen after a year, and were not assuming to provide by a verbal agreement for anything distant; but when one man agrees to support another so long as he lives with food, board, washing, &c., I find it difficult to reconcile my mind to the idea that that is an agreement which the legislature intended might be established without writing, on the ground that by its terms it was not necessary to endure beyond the year, but only might do so in case of the party who was to be supported living for a longer period. The law contemplates that life will continue for seven years as a general principle; and it seems rather repugnant to look upon parties making such an agreement as this as not contracting for anything to be done at a time more remote than a year, though no doubt it is literally true that the extension of the time may not go beyond the year, from any thing that the terms of the agreement require, and it is dependent on a contingency whether it shall or not. I do not consider that the case of *Fenton v. Emblers* (3 Burr. 1278) is not to be distinguished from this case, for I think it is distinguishable; but at the same time I think the language used there by the judges shew that they held the

statute to be applicable only to those cases in which the agreement by the terms of it was necessarily to extend to something that would be beyond the year. Mr. Roberts, in his treatise on the statute of Frauds, seems very clearly to understand that to be the effect of the decision in *Fenton v. Emblers*. To bring the case within the statute, it seems to be held that the very terms of the agreement must carry it beyond the year; that is, to some period beyond the year. It is not sufficient that the agreement *may* cover or extend to a period beyond the year, depending upon some uncertain contingency.

We should not be warranted by any authority, that I can find in treating this as a case within the statute; though I should have thought it should be so held in reason, if it were not for the strong authorities to the contrary, for, looking at the very words of the statute, I should have thought it not reasonable to say of this agreement that it was anything else literally than "an agreement not to be performed within a year," when it was by the very terms of it to endure so long as the plaintiff lived, which might be (as has been the case) for many years.

If the case had been within the statute, we could not, we think, have given any weight to the fact of the land having been conveyed as a performance on one side, because it is quite consistent with the evidence that that may have been for the past maintenance; and I confess I think this a case which illustrates very forcibly the danger of admitting parol evidence of such a contract as is alleged here, which I do not believe the legislature meant to do.

We feel bound by the adjudged case to discharge the rule.

Rule discharged.

McKENZIE V. STEWART.

Practice—Order in Chambers putting off trial, application to court to review.

The court will sometimes grant relief against an order in chambers, by rescinding any part of it which may be unjust or irregular; but they will not add to the terms of a conditional order which has been already acted upon.

A short time before the assizes at Kingston, the defendant obtained from a judge in chambers at Toronto a summons to put off the trial. The plaintiff's agent (the plaintiff being an attorney) was obliged to obtain delay, to communicate with his principal, who in the meantime incurred costs in preparing for trial. The order was afterwards granted on terms of paying *only the costs of the application*, and the defendant acted upon it by getting the trial postponed. The defendant had given no notice to the plaintiff of his intention to move. The court refused to alter the terms of the order, so as to compel the defendant to pay the plaintiff's costs of preparing for trial while in ignorance of it, though they were of opinion that it would have been more fair to have exacted the payment of such costs on granting the order.

Applications to postpone trials in outer counties should not be entertained in chambers at Toronto when the assizes are just coming on.

McKenzie (the plaintiff) obtained a rule *nisi* on the defendant, to show cause why an order made by Mr. Justice Draper, on the 21st of April last, putting off the trial to the autumn assizes, on payment of costs of the application only, should not be rescinded so far as regards the payment of costs; the application having been made after notice of trial served and after the usual costs of preparing for trial had been incurred by the plaintiff, and after the assizes had commenced, and the record had been duly entered for trial;—and why the defendant should not pay to the plaintiff the costs of the day, or all costs incurred by the plaintiff in preparing for trial; the defendant not having served notice of intention to make said application, and having served papers on the plaintiff after the said application to put off the trial was made, and the plaintiff having incurred the usual costs in preparing for trial before he had any notice of such application;—and why the defendant should not pay the costs of this application. He cited *In re Farrant and Goodrich*, 21 L. J. (Q. B.) 272; *Doe dem. Prescott v. Roe*, 9 Bing. 104; *James v. Kirk*, 1 Chy. 246; *Walker v. Parkins*, 2 D. & L. 982; *Pike v. Davis*, 8 Dowl. 387; *Gore Bank v. Chase*, 7 U. C. R. 454.

Helliwell shewed cause, and cited *Collins v. Aron*, 4 Bing. N. C. 233, *S. C.* 6 Dowl. 423; *Davy v. Brown*, 1 Bing. N. C. 460, 1 Scott 384, *S. C.*

The facts appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the affidavits in this case. The action was to be tried at Kingston. A very short time before the assizes the defendant applied to a judge in chambers in Toronto, upon affidavit, to put off the trial upon payment of costs. As is usual the judge's summons which was granted was served on the plaintiff's agent (the plaintiff being an attorney), and he felt it necessary to ask for delay that he might refer to the principal at Kingston for instructions. There is always danger of inconvenience in entertaining such applications in chambers at Toronto, when the assizes are just coming on. It is better to refer the parties to the judge of assize when he arrives in the county, for otherwise confusion and difficulty are very likely to happen. The delay here being desired by the agent representing the plaintiff, it was afterwards pressed upon the learned judge that the defendant should not be prejudiced by the delay, in respect to the costs which he might be made to pay of proceedings that might take place in the meantime, or that had taken place since the summons was granted; and the learned judge, exercising his judgment and discretion expressly upon that point, thought it is not unreasonable under the circumstances, when he determined as he did to postpone the trial, that he should do so on the terms of exacting from the defendant only the costs of the application.

The order so made was taken out by the defendant's attorney and acted upon; that is, he availed himself of the order, and served it, and the cause was in consequence postponed.

The learned judge, upon consideration, thinks it was an order more favourable to the defendant than he had a right to expect under the circumstances; for although the delay was at the instance of the plaintiff, yet it was unavoidable, and only became of consequence from the late period at which the defendant made the application. He thinks, therefore, as we also think, that it would have been more fair to have compelled the defendant to pay the costs of

whatever proceedings the plaintiff had been carrying on during the delay, and while he was in ignorance of the application, or uncertain as to the issue of it—of those proceedings, I mean, which had reference only to the approaching assizes; especially as the defendant had given no notice to the plaintiff in Kingston of his intention to move to put off the trial, and had besides, as it since appears, taken steps in the cause, by serving papers on the plaintiff thereafter he had made his application in Toronto. These being the circumstances, we are asked to rescind the judge's order, so far as it regarded the costs, and to compel the defendant, by our order now to be made, to pay the costs of the proceedings which were taken by the plaintiff with a view to the trial while things were in the state which I have described. He comes with his application in the following term, which is as soon as he could apply to the full court.

I confess myself a good deal perplexed by this application. If this were an order of a judge directing a party applied against to pay costs, which order remained yet to be acted upon, the court might, as in *Sheriff v. Gresley* (4 A. & E. 338), give relief against the compulsion of an order which they might think to be unjust or irregular, by rescinding that part of it which required costs to be paid; but, as is strongly expressed in that case, the court would not even in such circumstances interfere without great reluctance.

But this is an application to add to the terms of a conditional order already acted upon, and which has fulfilled its purpose, the defendant having obtained the benefit of it upon complying with what had alone been exacted of him. We have found no instance of such an order; and we think we should be opening the door to a class of applications never yet attempted either here or in England, for we do not see why, upon this same ground—that it would have been more just for the judge to have exacted costs, or to have dispensed with them, in any case in which an amendment has been allowed in chambers with or without costs, or an order has been made to stay proceedings without

costs—we might not be asked to open any such order, and to add costs or take away costs by our subsequent order in banc. We find very strong expressions of the judges reported in several cases against the propriety of reviewing what a judge in chambers has ordered, so far as regards costs; and we are not able to satisfy ourselves that we should do so in a case in which the order was clearly upon a matter that was discretionary with the judge, and where the order that was made has been finally acted upon, so that nothing remains to be done under it. We do not feel ourselves entitled to alter the conditions upon which an indulgence has been obtained, when we cannot be certain that if the judge had declined to grant the order except on more stringent terms, it would have been accepted and acted upon.

We are sorry that in this case the amount of costs in question happens to be rather large. If it had not been, we should not have thought for a moment of interposing; and we regret that as it is we think it more proper to discharge this rule, not because we doubt that the court has power to do it, but because we think it would be highly inexpedient and unusual to entertain an application after an order of this description had been granted upon terms, and had been taken out and acted upon by the party who had obtained it on such conditions as the judge in his discretion thought reasonable to impose.

Rule discharged.

PERRY ET AL., v. RUTTAN, SHERIFF.

13 & 14 Vic. ch. 62.—When affidavit must be made.

The affidavit of the truth of the debt and *bona fides* of the mortgage required by 13 & 14 Vic. ch. 62, need not be made on the same day that the mortgage is executed.

This was an action on the case for a false return of a *fi. fa.*, tried at Cobourg before Draper, J.

The only question brought before the court in banc. arose upon two chattel mortgages, which were objected to at the trial on the ground that the affidavits annexed, although they accompanied the mortgages at the time of registration,

were not sworn to on the same day that the mortgages were executed. This objection was overruled, and a verdict found for the defendant.

In Michaelmas term *Cameron*, Q. C., obtained a rule *nisi* for a new trial for misdirection.

Vankoughnet, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The only point argued on the return of the rule *nisi* in this case as the ground for the application for a new trial was, that there was misdirection in holding that a mortgage of goods was sufficiently registered in compliance with the statutes 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62, although the affidavit of the mortgagee required by the latter act, to the effect that the mortgagor is justly and truly indebted in the sum mentioned in the mortgage and that the mortgage was executed in good faith, was not sworn *till some days* after the execution of the mortgage. But it did accompany the mortgage when it was taken to the county clerk's office to be registered. The provision in the statute 13 & 14 Vic. ch. 62 is, that the mortgage "shall be accompanied with an affidavit of the mortgagee, that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage; that it was executed in good faith, and for the express purpose of securing the payment of the money so justly due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor."

The argument on the part of the plaintiff is, that as by the first act (12 Vic. ch. 74), the registering the mortgage is made equivalent to the mortgagee taking immediate possession of the goods, and is thus made a substitute for such possession, and as the possession must be immediate to make it avail, so the registration, when that is relied on instead of possession, must also be immediate. That, we think, would be too rigid a construction of the act, and would be contrary to what we must presume to have been the intention of it, for it would narrow the protection meant to be afforded against fraud. The important question at the time of registration is not merely whether there was a

debt due at the time of the execution of the mortgage, but whether the debt continues due at the time of registration; and the nearer to the moment of registration the affidavit is made the more satisfactory it must be on that point; otherwise the statute might easily be evaded, and the mortgage kept on foot for protecting the goods of the debtor for his benefit long after it had been satisfied wholly or in part. The statute has in this respect been literally complied with, for the affidavit did, *accompany* the mortgage when it was taken to be registered, and it was all the more satisfactory for being sworn at the latest moment before registration. We should not exact what the statute does not require, where the effect would be rather to defeat than to advance the object which the legislature had in view.

We think the rule for a new trial must be discharged.

Rule discharged.

PATCHIN V. DAVIS.

Evidence.

The 2nd clause of 16 Vic. ch. 19, by which plaintiffs and defendants may be compelled to attend as witnesses at a trial, does not apply when the parties reside out of the jurisdiction.

The plaintiff sued the defendant as indorser of a promissory note.

At the trial at Hamilton before Burns, J., the defendant proved that he had, a few days before the assizes, caused the attorney of the plaintiff, who lived in Buffalo, in the State of New York, to be served with a notice that he would be required to appear and be examined as a witness upon the trial. He did not appear. The learned judge held the statute did not apply with respect to plaintiffs or defendants resident in a foreign country; and the cause proceeded, and a verdict was rendered for the plaintiff.

Martin moved for a new trial.

ROBINSON, C. J.—Upon the same point being brought before me upon the circuit I had given the same opinion, and we all agree in thinking it very clear, both in reason

and on the face of the statute, that the second clause applies only with respect to parties being within the jurisdiction; and that the third clause which authorizes a commission to be issued at the instance of one party in a cause to examine the opposite party when he resides in a foreign country, is the only course to be taken in such cases.

Per Cur.—Rule refused.

MORAN v. PATTON.

In an action of ejectment upon a sheriff's sale under *fi. fa.* brought against the debtor, no evidence need be given of his title, nor need it be shewn that he was in possession of the premises.

Ejectment for the S. W. part of 13 in the 17th concession of Adjala.

At the trial at Barrie, before McLean, J., an exemplification of a judgment in Q. B. was put in, at the suit of one Whiting, against the defendant in this case, entered on the 23rd of November, 1850, for £163 12s. 9½d., and a *fi. fa.* against lands produced received by the sheriff on the 4th of April, 1851, under which the lands were sold to this plaintiff in August, 1852, and a deed made in pursuance of the sale.

It was objected that it was necessary for the plaintiff to shew title in the defendant, the debtor, or at least that he was in possession of the premises. This objection was overruled by the learned judge, and a verdict given for the plaintiff.

Eccles moved for a new trial, for misdirection.

ROBINSON, C. J., delivered the judgment of the court.

We think when an action of ejectment upon a sheriff's deed made in pursuance of a sale on execution is brought, as in this case, against the defendant in the *fi. fa.*, who maintains possession notwithstanding all his interest has been sold under the writ, it is not necessary to give any evidence of his title. If he was not in actual possession of the estate before, or at the time of, the sheriff's sale—and how that fact was, did not appear in this case—he may possibly be claiming under a title acquired since the sale; but it would be for a him to shew that.

The rule is laid down without any qualification as to whether the debtor was in actual visible occupation at the time of the sale or otherwise, that an action of ejectment upon *elegit*, or a sheriff's sale under a *fi. fa.*, which may take place in England in the case of a term for years, if the action be against the debtor in the *fi. fa.* no evidence need be given of his title.

Rule refused.

In re CHARLES MONTGOMERY CAMPBELL AND RUTTAN, SHERIFF.

Application for order on Sheriff to make a deed to purchaser.

The court refused to interfere summarily to compel the sheriff to make a deed of a lot sold by him under execution, where it appeared that he had been advised not to complete the sale on account of an irregularity in the advertisement; and that the same land, on being again advertised and exposed to sale under a subsequent writ, brought a price far exceeding that for which it had been purchased by the applicant.

M. C. Cameron obtained a rule *nisi* on the sheriff, directing him to execute a deed to the applicant, conveying to him in fee the estate of John Montgomery Campbell and Henry John Stanly, and of each of them, in lot 19 in the first concession of Haldimand; the said lot having been sold by the sheriff by public auction to this applicant, under a writ of *fi. fa.* against the lands of said Campbell & Stanly.

In August of 1850, *McKechnie* and *Winans* recovered judgment against Campbell & Stanly for £3004 10s. 4d., and on the 7th August, 1850, a *fi. fa.* against goods was issued on this judgment, on which £2162 2s. was made; and a small sum besides this was made afterwards on an alias writ against goods, and *nulla bona* returned for the residue. Then a *fi. fa.* issued against lands returnable on the last day of Hilary Term, 1852, which was delivered to the sheriff on the 31st of January, 1851.

Under this writ, and another against the lands of the same parties from the County Court of Northumberland and Durham, at the suit of one Hurst, the sheriff seized in execution lots 19, 21, and 22, in the first concession of Haldimand, and 21, in concession B, of the same township,

and advertised the interest of the defendants in those lands for sale on the 26th of February, 1852, but they were not then sold, and both writs were returned lands unsold for want of buyers. Writs of *ven. ex.* issued, under which the lands were put up to sale on the 7th of April, 1852; and this applicant, Charles Montgomery Campbell, was the highest bidder and purchaser of all the lots, which were knocked down as follows:—for lot 19, £10; for lot 20, £25 10s.; for 21, £12 15s.; for lot 22, £5; and for 21, in concession B., 10s.

The applicant swore that he paid the sheriff all the above sums, and received a conveyance of all the lots except the lot 19; for which lot the sheriff refused to make a deed, although he had paid the price to him.

On the 23rd of August, 1852, a deed was tendered to the sheriff to be executed; but the sheriff refused to convey the lot 19, saying that the plaintiff's attorney in the suit of *McKechnie and Winans* had notified him not to make a deed for the lot 19, and had indemnified him.

In answer the sheriff filed an affidavit, admitting that he had declined to convey lot 19, but had offered to make a deed of the other lots, and to return the purchase money paid on account of lot 19 (£10); that the conveyance of the other lots had been accepted, but the applicant refused to receive back the £10 bid for lot 19; that he, the sheriff had been advised by counsel that he ought not to complete the sale of lot 19, by executing a deed of it, on account of an irregularity in the advertisement of the sale, which might have misled the public; that the lot is very valuable, worth £2000 if it were unincumbered, but it is incumbered to the extent of £1600; that an alias writ of *fi. fa.* against lands had since issued, under which he, the sheriff, was required to advertise the lot 19 in a more special manner, as being the separate property of the defendants in the *fi. fa.* as well as their joint estate; that under this writ one Castle bid off the lot at £120; that his bid was taken down in writing, and Castle tendered the amount bid, but that the sheriff, having in the meantime been served with this rule, refused to execute a conveyance to Castle till

this application should be disposed of; and that Castle claimed to be entitled to a deed.

Cameron, Q. C., shewed cause.

M. C. Cameron, in support of the rule, cited *Bank of Upper Canada v. Miller*, H. T. 3 Vic.

ROBINSON, C. J., delivered the judgment of the court.

We will not pretend to decide summarily between the rights of the respective bidders to receive a title. The applicant, Charles M. Campbell, must take his remedy against the sheriff by action, if he determines to persevere in his claim. The court would only interfere summarily in a perfectly clear case, and for the advancement of justice. The sheriff acts at his peril. A jury, on a view of all the circumstances, might see good reason why the applicant should not, in fairness, insist on his purchase; the effect of which would be to acquire to himself for £10 what it seems upon the succeeding sale, on a fuller explanation of the title, went at a price that would produce £120 for the creditors of his brother.

Rule discharged.

BUTLER AND McNIEL V. DONALDSON.

14 & 15 Vic. ch. 114.

In ejectment under the late act one or more of several plaintiffs may recover.

Draper, J., suggested, that under section 5 there may be a distinction between the *claim* and the *title*, so as to render it incumbent on claimants, where there is more than one, to point out in the writ on what or whose title they rely as giving them a right to the possession, and to prove *such title*, which may be either in one of themselves, or possibly in a third party.

EJECTMENT for lot No. 14, in the fifth concession of Grantham.

The patent for these premises issued to Andrew Butler in 1798; and the plaintiff's counsel in opening the case stated that the patentee had conveyed many years ago to one Secord, who entered into possession, and subsequently conveyed to another party, from whom the other plaintiff McNiel purchased; that McNiel had left this province within forty years next before the commencement of this

suit, and had not since returned; and it was insisted that either in his name or that of Butler these defendants were liable to be ejected. Upon this opening the defendant's counsel moved for a nonsuit, on the ground that by the opening it appeared the plaintiff had no joint interest in the lands, and therefore could not recover in this joint action, and they referred to *Young et al v. Scobie*, 10 U. C. R. 372. The learned judge (McLean, J.) nonsuited the plaintiff on this objection.

H. Eccles moved to set aside the nonsuit, and for a new trial.

Cameron, Q. C., shewed cause.

ROBINSON, C. J.—In a case in this court of *Young & Young v. Scobie* (10 U. C. R. 373), I gave it as my opinion that there could not be a recovery in favor of one of several plaintiffs in an ejectment in its present form. The plaintiff in that case was relying for proof of title on a receipt given him for money paid to Mr. Thorburn, as agent for selling Indian lands; and my brothers being clear that such receipts were not within the 18th clause of the Land Sales Act, and that the rule for nonsuit must, on that ground, be made absolute, did not, I think, give their attention to the other ground of misjoinder, which seemed to me to be also decisive against the plaintiffs. My attention was afterwards called to our new Ejectment Act, 14 & 15 Vic. ch. 114, as containing a provision which appeared to authorise a recovery by one or more of several plaintiffs in ejectment. I am glad that this case now calls for a particular consideration of the question, in order that the opinion of this court may be pronounced on the point.

The act sets out with declaring in the preamble an intention “to abolish all fictions of law in actions of ejectment, and to place such actions, as nearly as may be, on the same footing as other actions between parties.” This would lead us to suppose that in ejectments, as in all other actions, whether *ex contractu* or *ex delicto*, a misjoinder of the plaintiffs, though it did not appear on the record, (as it might in other actions) would subject the plaintiffs to be nonsuited at the trial, for such in all cases is the effect of a misjoinder. In

the first clause it is directed that *the names of all the persons claiming the property shall appear as plaintiffs* in the summons: this gives us no information of what was meant to be the effect if some of the persons whose names should be used as plaintiffs should be found upon the evidence at the trial to have no title.

The fifth clause provided that if no appearance shall be entered within the time appointed "*the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the property:*" this does not assist us in the construction, because where there is no trial and no defence all the plaintiffs must of course take judgment.

The seventh clause is the material one, and perhaps must be taken to settle the question in favor of the right of either or any of the plaintiffs to recover, though the others may fail to prove title, and therefore fail in the action. It runs thus:—"And be it enacted, that a special case in any such action may be stated in the same manner as at present; and if no special case be agreed to, the parties may proceed to trial in the same manner as in other actions, and the question at the trial shall be, except in the cases hereinafter mentioned, *whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled* ; but the jury may find a special verdict, as at present." This clause is not accurately expressed, for it is first required that the jury shall find whether the statement in the writ of the title of *the claimants* be true or false; and *if true* (which it cannot be if only one or a part of the plaintiffs named in the writ be found entitled), then *which of the claimants* is entitled;—the direction in reality amounts to this, that if it be found that *all the claimants* are entitled, then the jury are to say *which of them* is entitled. But whatever may have been meant by this inaccurate mode of expression, there seems in the clause a sufficiently plain indication of the intention that a verdict may be returned in favor of one or more of several plaintiffs, and not in favor of the others, for I do not see what else can be meant.

The eighth clause provides, that upon a finding *for the claimants* judgment may be signed and execution issue, as before in the action of ejectment, which judgment shall have the same and no other effect than *at present*, (that is, the same effect as judgments in ejectment under the former practice). In this clause the legislature allow judgment only in case the verdict shall be given *for the claimants*, which, according to common construction of language, would be taken to mean for all who are claiming where there are more than one. The legislature do not say that upon a finding for the claimants, *or any of them*, judgment may be signed. The omission to do so may have been mere inadvertence; though it is singular that in the very next clause they are careful to allow the jury to sever in their finding where in accordance with the law and practice it is right they should do so, for they enact "that upon a finding for the *defendants or any of them* a judgment may be signed and execution issue against the claimants named in the writ." It is remarkable that in the whole act in speaking of the plaintiffs they have nowhere said the plaintiffs *or any of them*.

I see nothing in what remains of the act that can assist in determining the present question; and an examination of the whole results, I think, in this, that the seventh clause does seem plainly to allow, and indeed to require the jury to sever in their verdict as regards plaintiffs, according to the title made out in evidence, though the clause is awkwardly expressed, as I have noticed; and if so, then the only other question is, whether in other parts of the act there is such evidence of a contrary intention as should lead us to give a different construction to the seventh clause, and whether, on account of any great difficulty to which such a course of practice would lead, we are driven to conclude that the legislature cannot have meant what they appear to have meant by that clause.

It is difficult indeed to bring one's mind to a satisfactory conclusion as to what the legislature probably intended, for it may be that they were not conscious that if they allowed a verdict to pass in favour of one of several plaintiffs in

ejectment, and against others, they would be placing the action of ejectment on a footing perfectly distinct in this respect from that of all other actions, instead of placing it "as nearly as may be on the same footing," which they declared was their intention.

I think we have no sufficient ground for denying to the seventh clause its obvious construction, and that in actions of ejectment now brought the verdict may be in favor of one or more of several plaintiffs.

DRAPER, J.—My present impression is, that the nonsuit was wrong; that on the facts opened the defendants would have been entitled to a verdict so far as Butler was concerned, there being apparently no ground whatever to make him a claimant, as all his interest had been conveyed to Secord, through whom the title in fee had passed to McNiel; but on the opening McNiel *might* have shewn a right to the possession, and should have been allowed to go to the jury; but I am not at all clear. The phrase in section 5—"the person whose title is asserted in the writ"—may perhaps render it incumbent on claimants, when there is more than one, to point out in their writ what or whose *title* they mean to rely on; and if they have so stated their claim as to set up a *title* in two, under which they claim possession, they will fail unless they prove such a *title*; for this section seems to make a distinction between the claim and the title, as if several might join in a *claim* to possession, relying on a *title* in one or other of themselves, or possibly of a third party, not a claimant in the action, but who is named in the writ as having title.

BURNS, J., concurred.

Rule absolute.

CHRYSLER V. SERPELL.

13 & 14 Vic. ch. 53, secs. 53, 55, 87, 97.

The bailiff of a division court from which a warrant of execution issues, has authority to execute it in any other county in which the defendant has goods.

TRESPASS *qu. cl. fr.*, and taking and converting the plaintiff's goods. Plea—Not guilty, by statute.

The cause was tried at Simcoe, before Burns, J. The plaintiff in his opening admitted that the defendant was bailiff of a division court in the county of Brant; and that he went into the county of Norfolk, and executed a warrant of execution.

The learned judge at the trial held that the 97th section of the Division Court Act (13 & 14 Vic. ch. 53) gave him power to do what he had done, and nonsuited the plaintiff.

McMichael moved to set aside the nonsuit, contending that the 53rd, 55th, and 87th clauses of the statute shew that the defendant had not such authority.

Cur. adv. vult.

ROBINSON, C. J., afterwards delivered the judgment of the court.

We have examined the clauses of the statute bearing upon this question, and are of opinion that the 97th clause of the statute authorized the defendant, being bailiff of the division court from which the warrant of execution issued, to execute it in the other county in which the defendant had goods; and that there is nothing in the 53rd, 55th, or 87th clauses which we could hold has the effect of nullifying the clear and express provision in the 97th clause. If they were inconsistent with it, it would be the 97th clause which should prevail, being the latest declaration of the will of the legislature; but there is no such inconsistency—only an apparent inadvertence in one of the clauses, where the framer of the act seemed not to bear in mind the more extensive authority intended to be given in the 97th clause.

We think the statute was rightly construed at the trial; and that there can be no rule granted.

Rule refused.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

FROM EASTER TERM, 15 VICTORIA,
TO EASTER TERM 16 VICTORIA.

ABATEMENT.

See CONSIDERATION.

ACCOUNT STATED.

See RECOGNIZANCE.

ACTION.

See CASE.—COVENANT.

ADMINISTRATION.

See PLEADING, 1.

Administration bond, action on—Practice—The next of kin cannot claim substantial damages in an action on an administration bond, where no decree for distribution has been obtained, by shewing merely that the administrator has received moneys for the estate. The proper course for the defendant in such a case is, to apply to the court to stay proceedings on the bond until a decree for distribution has been obtained. *The Earl of Elgin v. Crosby*, 256.

AFFIDAVIT.

See CHATTEL MORTGAGES, 1, 3, 4.

Defect in entitling of affidavit.—1. An affidavit entitled C. D. (the defendant) at suit of,—or, and—

A. B. (the plaintiff) is bad. *Winter v. Mixer et al.*, 110.

2. An affidavit in support of a motion to quash a by-law is sufficient, though not entitled in any court. *Frazer v. The Municipal Council of Stormont, &c.*, 286.

Practice—Affidavit to set aside order.—3. The affidavit on which a motion was made to rescind a judge's order stated that certain papers in the suit had not been served on the deponent, but did not further shew his connection with the cause either as party or attorney: *Semble*, that the affidavit was bad, *Wilkes et al. v. McMillan*, 292.

Motion to quash by-law—Affidavit of applicant.—4 The affidavit of the applicant stated him to be a ratepayer, and a resident householder, and that he obtained the copy of by-law from the clerk. *Held*, not necessary to give any further addition of deponent. *Baker v. The Municipal Council of Paris*, 621.

AGENT.

See CHATTEL MORTGAGES, 3.—CROWN LANDS AGENT.—LAND SALES ACT—PROMISSORY NOTES, 4.

AGREEMENT.

See CONSIDERATION.—PLEADING, 4,

7.—PENALTY.—FRAUDS, (STATUTE OF).—VENDOR AND VENDEE.

Construction.—1. The plaintiff agreed to do certain work for the defendant, to be approved of by one D. B. It was provided that in case of D. B.'s absence, any other person might be appointed in his place by the plaintiff and defendant. *Held* that the defendant might dispense with such appointment and accept the work himself. *Ladd v. Bullen*, 295.

Contract by sureties for performance of agreement, reciting that agreement by a wrong date—Effect of, in action against sureties—Demurrer.—2. K. having agreed with the plaintiffs for the purchase of some lumber, the defendants consented to guarantee his punctual payment for the same; but inadvertently the first agreement, in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties as bearing date the 22nd of December, 1851, whereas it was dated on the 8th of January, 1852. The plaintiffs, in an action against the sureties, declared that by agreement bearing date the 8th of January, 1852—after reciting a certain agreement next thereafter stated or referred to, entered into for the sale of certain lumber by the plaintiffs to K., bearing date the 8th of January, 1852,—the defendants covenanted with the plaintiffs that K. should perform the said agreement; that by the said last-mentioned agreement, the date whereof was the 8th of January, 1852, K. agreed to pay for the lumber at certain specified prices; yet that, after the making of the said last-mentioned agreement, the plaintiffs delivered to K. large quanti-

ties of lumber, for which he had failed to pay.—The defendants set out both agreements on oyer, and demurred, assigning for cause that the original agreement was not set forth in the declaration, or referred to with sufficient certainty. *Held*, that the cause of demurrer assigned was not suited to the objection intended to be urged, as to the discrepancy of dates; and that the defendants should not have demurred, but should have pleaded "*non est factum*," and relied at the trial upon the variance between their actual agreement and that declared on. *Semble*, that on such an issue, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth et al. v. Townley et al.*, 579.

AMENDMENT.

See NEW TRIAL, 2.—PRACTICE, 4.
—RECORD.

Amendment at Nisi Prius.—Where in an action of assumpsit the wife of the plaintiff was improperly joined, *held*, that the judge at Nisi Prius had no authority to allow an amendment of the record by striking out her name. *Rischmuller et ux. v. Uberhaust*, 612.

APPEAL.

1. The order of a judge of a County Court, upon an application for leave to amend, is not an appealable matter. *Branigan v. Stinson*, 403.

Appeal—Practice—Stay of Execution.—2. Where a *fi. fa.* has been placed in the sheriff's hands, and acted upon before the defendant has appealed—*i.e.* before the writ of appeal has been allowed—there

can be no stay of execution. The sheriff must sell the goods, and pay the money into court to abide the event of the appeal. *Gilmour v. Hall and Platt*, 508.

Practice—Time for appealing from County Court.]—3. *Quære*, as to the construction of the 57th clause of 8 Vic. ch. 13—whether an appeal from a county court must be set down for argument at the next term after judgment delivered below, or after the judge shall have certified the proceedings. *Ruttan v. Vandusen*, 620.

APPEARANCE.

See RECORD (NISI PRIUS.)

ARBITRATION AND AWARD.

See GUARANTEE.

Arbitration—Sufficiency of—Damages awarded not recoverable in the cause—Verdict allowed to stand as security for—Execution of award at same time and place not necessary, when memorandum of award so signed.]—Action for injury to a water-course and mill-privilege. At the trial “the cause and all matters in difference between the parties” were referred to certain arbitrators who were specially authorized in the reference to determine the value of the property alleged to be injured, as well as to award damages. A verdict was taken for £1,900 and it was agreed that the verdict should stand as security for the payment of such value, as well as for any damages that the arbitrators might award, and should be reduced or increased according to the award. At the conclusion of their inquiry the arbitrators signed a minute of their decision, but the award itself was not executed until some days after, and was signed by the arbitrators separately and at different times. They awarded that

the defendant was entitled to a verdict, and they assessed the damages in the cause at £500, and ordered the verdict to be reduced to that sum. *Held*, that under the terms of the reference the verdict might stand as security for any damages in the power of the arbitrators to award, and therefore for those given though the arbitrators took into consideration injuries caused before the first day laid in the declaration, and which perhaps, strictly, could not have been recovered for in the cause. (The award itself was clearly not bad on this ground). *Semble*, that in the absence of any express agreement in the submission, it would be unnecessary to distinguish how much was awarded in respect of matters in difference in the cause, and how much for other matters. *Held, also*, that the arbitrators, having signed a memorandum of their judgment at the same time and place, might execute the more formal award separately and at different times, but within the time allowed. *Williams v. Squair*, 24.

ARREST.

See MALICIOUS ARREST.—PRACTICE
2.

For what sum.]—1. The provision in 5 W. IV. chap. 3, that no *ca. sa.* shall issue on a judgment where the sum recovered is under £10 exclusive of costs is still in force. *Ley v. Loudon and Dempsey*, 380.

Application to set aside process refused.]—An order was made in chambers that a defendant arrested on a *ca. re.* should be discharged from custody, with costs, he undertaking to bring no action; and in the order leave was reserved to him to move the court to set aside the writ, and the arrest there-

on, &c., if he should be so advised. The court discharged a rule for this purpose; for the defendant having been released from custody, and being precluded from bringing an action, there could be no object served by setting aside the process. *Brown v. Brown*, 393.

ARTICLED CLERK.

Service under articles]—The applicant, in 1847, articulated himself to J. M. an attorney, then in partnership with E. J. In November, 1850, J. M. went to England and did not return; in February, 1852, his partnership with E. J. was dissolved. In March 1852, the clerk articulated himself of his own accord, to T. G. for the residue of his five years—J. M. not being a party to, or consenting to this arrangement. The court would not allow the time served with the last master. *Ex-parte McIntyre*, 294.

ASSENT.

When implied.]—See "Money paid."

ASSESSMENT.

See TAXES.—TOWN COUNCILLOR.

ASSESSMENT OF DAMAGES.

Practice—Assessment of contingent damages.]—There can be no assessment of damages where a verdict is found for defendant on an issue going to the whole cause of action. *Prynne v. Carroll*, 519.

ASSETS.

See LANDS.

Action against executrix—Plene administravit—Amount of verdict—What are assets.]—Assumpsit against an executrix. Plea—Plene administravit. Assets were admitted to an amount less than the

claim. It was proved that the testator had joined one M. in giving a note for the price of a carding machine, which M. was to hand over to him in order to save him harmless.—This was not done, but after the testator's death defendant got the machine from M. to hold as security against the note.—It was also proved that there were crops in the ground at the testator's death. *Held*, 1st. That the verdict should be only for the value of the assets proved, and not for the amount of the debt. 2ndly. That the carding machine would not form assets. 3rdly. That the crops would be assets, in the absence of any evidence as to the contents of the will. *Fisher et al. v. John Trueman and his wife Jane Trueman, as executrix of John T. Anderson, deceased*, 617.

ASSIGNMENT.

See REGISTRATION.

Assignment of lease by assignee of lessee, not fraudulent in this case—Deed of assignment sufficient to pass lease.]—1. The plaintiff, being lessee of T. S., of certain premises, assigned his term and all other property to the defendants for the benefit of his creditors. The defendants took possession in March and remained until August, disposing of the plaintiff's stock so assigned; they then quitted the premises, having paid the rent up to November following. They requested the lessor to take the premises off their hands, but he refused. In January they assigned to one P. B., a pauper; the plaintiff knew nothing of this assignment; after the expiration of the term he was sued by the lessor, and compelled to pay two quarters rent; for which, and for his costs so incurred, he brought assumpsit

against these defendants. *Held* (the above facts having been submitted for the opinion of the court,) that the assignment by the defendants could not be treated as fraudulent, and that the plaintiff could not recover. *Held* also, that the interest in the lease passed to the defendants under the assignment as set out in the statement of the case. *Magill v. Young et al.*, 301.

*Assignment, construction of—Evidence of actual and continued change of possession—*12 Vic. ch. 74, 13 & 14 Vic. ch. 62.]—2. A deed was executed by John N. Kline & Son, of the first part, whereby, after reciting that they had proposed and agreed to assign *all their personal estate and effects* to certain parties of the second part, they conveyed and assigned to the said parties, "all and singular the stock in trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to, or owing to the said parties of the first part, and which are set forth in the schedule hereto annexed marked with the letter A, and subscribed by the parties hereto of the first and second parts; and all the personal estate whatsoever of the said parties of the first part and all their estate and interest therein." No schedule was attached to the deed at the time of execution, but schedules were afterwards annexed, signed *John N. Kline & Son, John N. Kline, ju., Anthony Kline.* *Held*, that such deed came within the 12 Vic. ch. 74, and 13 & 14 Vic. ch. 74, and 13 & 14 Vic. ch. 62; that the evidence set out in the statement was not sufficient to shew an actual and continued change of possession, and that registration was therefore necessary. *Held*, also, that, independently of the

schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline. *Heward v. Mitchell et al.*, 535.

ATTORNEY.

*Attorney suing for costs and proceeding by attachment at the same time—Order of Court thereon.]—*The plaintiff, an attorney, brought an action against the defendant for costs as between attorney and client. Before entering appearance the defendant procured an order for taxation, and in granting this order an undertaking was exacted from him to pay what should be found due. This order was made a rule of Court, and an attachment irregularly issued upon it—under the pressure of which the defendant paid the amount taxed. The plaintiff also proceeded in the suit by signing interlocutory judgment. The Court, under these circumstances, ordered that the plaintiff (as an attorney) should pay the money received by him into court—that the defendant should be relieved from his undertaking to pay the sum taxed—that the interlocutory judgment should be set aside without costs—and that the plaintiff should pay the costs of this application. *Regina v. McLeod, in re Miller v McLeod*, 588.

BAIL.

See RECOGNIZANCE.—LIMITS.

BANK.

See PROMISSORY NOTES, 1.

BOND.

See PLEADING, 6, 12.—REPLEVIN AND REPLEVIN BOND, 2.

BY-LAW.

See AFFIDAVIT, 24.

By-law for payment of a debt must contain the rate to be levied, and specify the debt to be paid.—1. A by-law for payment of a debt must contain on the face of it the rate authorized to be levied for making up the sum granted. Such by-law is illegal if it direct a gross sum to be raised for the payment of the current general expenses of the county, and the liquidation of the debt due—not stating what debt, or of what amount. Whether the provisions of 4 & 5 Vic. ch. 10, sec. 41, are to be regarded as applicable to by-laws passed under 12 Vic. ch. 81, or whether the court must determine on their validity according to other statutes in force, and the common law—*Quære. The Canada Company v. Municipal Council of Middlesex*, 93.

By-law to take Stock in Railroad quashed.—2. A by-law to take stock in the Bytown and Prescott Railway was quashed, 1st, Because it appeared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vic. ch. 132. 2ndly. Because no sufficient rate was not imposed for the payment of the debt and interest, as required by 12 Vic. ch. 81. The defendants did not support their by-law, and the court refused to hear counsel on behalf of the Railway Company, as the rule was not directed to them. *In Re Billings and The Municipal Council of the Township of Gloucester*, 273.

By-law for closing highway—Objections to—12 Vic. ch. 81.—3. *Held*, that a by-law was sufficiently authenticated for the purpose of a motion against it, by an affidavit of the relator that the copy pro-

duced was received by T. from the clerk of the council, and delivered by him to the deponent. It is not necessary to recite in a by-law all that is requisite to shew the authority of the council, or the regularity of their proceedings; these will be presumed, until the contrary is proved. It was objected that a by-law was expressed on the face of it, to be passed by the "Municipality of Vaughan," there being no such corporate body. *Held*, that this was not a valid objection; and *semble*, if it were, that the applicant recognized the by-law as one passed by the corporation intended, by the fact of his moving against it as a by-law passed by that body. A by-law for shutting up an old road need not describe its course, &c., minutely. Such a by-law is not bad for directing that the parties applying to have the road closed shall pay the expenses. *Held*, that want of the requisite notice was not sufficiently shewn on the affidavits. *Fisher v. The Municipal Council of Vaughan*, 492.

Pleading.—4. *Semble*, although the statute enacts that all by-laws made and passed shall be authenticated by seal, and signed by the person presiding; yet it is not necessary to set out these facts whenever a by-law is pleaded, but it is sufficient to aver that it was *duly* made and passed. *Wilson v. The Municipal Council of Port Hope*, 405.

5. Where the seal of the corporation was not mentioned in the clerk's certificate, but was on the same page with the certificate, just above it, and opposite to the signatures of the reeve and clerk—the by-law was held to be sufficiently proved. *Baker v. the Municipal Council of Paris*, 621.

Nature of objections for which by-laws may be quashed—12 Vic. ch.

81, secs. 155, 168, 192.]—7. The court has no authority to quash a by-law, on application, except for something illegal appearing upon the face of it; or, except, perhaps, where it is shewn to have been passed under circumstances which by the express term of the statute make it illegal.—They therefore refuse to interfere with a by-law, on the ground that a quorum of the Council was not present at its passing, as required by 12 Vic. ch. 81, sec. 168. *Sutherland v. The Municipal Council of the Township of East Nissouri*, 626.

BYTOWN AND PRESCOTT RAILWAY.

By-law to take stock in]—6. See “By-law, 2.”

CARRIERS.

See NEGLIGENCE.—VERDICT, 2.

CASE.

See DAMAGES, 2.

Waggon left in the highway—Liability.]—When a waggon is left standing in the highway, the owner cannot exempt himself from liability by shewing that the person injured thereby was drunk at the time of the accident. *Ridley v. Lamb*, 354.

CERTIORARI.

An indictment cannot be removed by *certiorari* from the assizes after judgment pronounced, for the purpose of applying for a new trial. *The Queen v. Smith et al*, 99.

CHATTEL MORTGAGES.

See FRAUDULENT DEEDS AND ASSIGNMENTS.

12 Vic. ch. 74—13 & 14 Vic. ch. 62—*Chattel Mortgages—Re-filing of.*]—1. Where a mortgage of personal property was re-filed with the county clerk forty seven days before the expiration of a year

from the first filing it was held insufficient, the statute requiring that such re-filing shall take place “*within thirty days next preceding*” the expiration of one year. It is not necessary that the affidavit of execution should be repeated, or any copy of it filed, on the re-filing of such mortgage. *Beaty v. Fowler*, 382.

Registration—Computation of time]—2. On the 18th of July, 1851, one M. gave the plaintiff, to secure a debt, a bill of sale on certain goods, which was duly registered on the following day. On the 16th of July, 1852, he executed another bill of sale of the same tenor, but to secure a smaller sum—the goods assigned being, with a few exceptions the same as the first: this was registered on the 19th. On the same day, and before the registry, a *fi. fa.* against M. was placed in the sheriff’s hands. There was not, in the case of either assignment, any actual delivery of the goods. *Held*, that the *fi. fa.* was entitled to prevail: that the first bill of sale was waived by taking the second, and was therefore out of the question, though in any case it would have ceased to be in force after the 18th of July, and the 2nd filing would have been too late. *McMartin v. McDougall*, 399.

13 & 14 Vic. ch. 62—*Affidavit required by.*]—3. The 13 & 14 Vic. ch. 62, requires that the mortgagee himself, shall make affidavit of the mortgage debt being due, and that the mortgage was made in good faith; therefore a mortgage filed upon an affidavit of an agent of the mortgagee, was held void. The defendant in this case was shown to be a creditor of the mortgagor at the time such mortgage was given: it was held therefore, that

such mortgage was void as against him at the first; and the court refused, on the suggestion of the mortgagee, to entertain any questions as to the regularity of the defendant's judgment entered after the date of the mortgage, or of an attachment issued upon it. *Holmes v. Vancamp*, 510.

13 & 14 Vic. ch. 62—*When affidavit must be made.*—4. The affidavit of the truth of the debt and *bona fides* of the mortgage required by 13 & 14 Vic. ch. 62, need not be made on the same day that the mortgage is executed. *Perry et al. v. Ruttan, Sheriff*, 637.

CLERK OF THE PEACE.

Clerk of the Peace—Fees.—A Municipal Council, in 1850, passed a vote, assigning to the clerk of the peace a fixed salary for that year, "in lieu of all fees." *Held* (the Jury Act, 13 & 14 Vic. ch. 55, having been subsequently passed), that this could not debar him from claiming the fees allowed by the statutes for preparing the jury books for the following year. *Pringle, Clerk of the Peace, v. McDonald, Treasurer of the United Counties of Stormont, Dundas, and Glengary*, 254.

COMMISSION TO EXAMINE WITNESSES.

An affidavit of the due taking of a commission to examine witnesses need not be signed by the deponent. *Wilmot v. Wadsworth et al.*, 594.

COMMON SCHOOLS.

Common School Act, 13 & 14 Vic. ch. 48—Separate Schools, in what fund entitled to share.—The court refused to interfere by mandamus on the application of the Trustees of the Roman Catholic School of Belleville, to compel the School Trustees of the town to pay over

to them a certain sum claimed as their share of the common school fund: 1st. Because it could not be said to be clear and without question what sum the applicants were entitled to, or in what fund they had a right to share under the provisions of the act. 2ndly. Because the applicants, before coming to this court, should at least have been able to shew that they had submitted their complaint to the Local or Chief Superintendent and that he had refused to entertain it; and *quære*, whether the decision of the Chief Superintendent upon such a complaint would not be final. 3rdly. Because the application should not have been made on behalf of the trustees, but on that of the teacher of the separate school, as being the person entitled to the money. *Semble*: That what a separate school established under the 19th section of the act is entitled to share in, is the sum apportioned by the Chief Superintendent out of the Government grant, and the sum, at least equal in amount, raised by local assessment for the payment of teachers. *The Trustees of the Roman Catholic School of Belleville v. The School Trustees of the Town of Belleville*, 469.

CONSIDERATION.

See GUARANTEE.—PROMISSORY NOTES, 3.

Account stated—Evidence—Consideration—A. gave to B. and C. a writing, by which, for value received, he promised to pay them a certain sum in yearly proportions. This appeared to have been given for the price of the land sold to A. *Held*, that it was immaterial whether land was owned by A. alone or by A. and B., and that the plaintiffs might recover either under

a count as on an agreement, or on an account stated. *James & Jacob McQueen v. Hugh McQueen*, 359.

COSTS.

See NEW TRIAL, 1.—PRACTICE, 5.

Costs under 22 & 23 Car. II.—Judgment set aside for want of notice of taxation, to admit certificate under 43 Eliz.]—In trespass *qu. cl. fr.*, the defendant pleaded the general issue only, and the plaintiff had a verdict for 20s. A certificate under 22 & 23 Car. II., was moved for at the trial, and refused. *Held*—confirming *Hawkes v. Richardson*, 9 U. C. R. 229—that the plaintiff was entitled at least to county court costs; but the judgment having been entered without notice of taxation, the court set it aside as irregular, in order to give the defendant the advantage of a certificate under 43 Eliz. ch. 6, which had been obtained after judgment, and therefore too late. *Davis v. Barnett*, 501.

COUNCILLOR.

See TOWN COUNCILLOR.

COUNTY COURT.

See APPEAL, 1, 3—PLEADING, 6.

COVENANT.

See HIGHWAY, 2—LANDS—PLEADING, 3, 5, 8, 14.—REGISTRATION.

1. An action will not lie on a covenant for title against the devisees of the covenantor.—*Sickles v. Snyder et al.*, 209.

2. *Action on covenants for title and quiet enjoyment, not maintainable.*—In an action on the case the declaration set out that in 1837 one Winniett conveyed a piece of land to E. by bargain and sale, giving absolute covenants for title and quiet enjoyment: that E. entered under this deed and died seized, having made his will in 1840 devising "all his messuages, lands

and real estate" to B., in trust: that B. entered into possession of the land conveyed to E., and in 1843 conveyed it to the plaintiff by a deed of bargain and sale without covenants: that the plaintiff soon afterwards sold to D., giving a deed with the usual covenant for quiet enjoyment. (The deed from Winniett, and the plaintiff's deed to D., both contained the usual reservation of the rights of the crown as expressed in the original grant.) The declaration then averred that when Winniett conveyed to E. he was not seized according to his covenant, but that part of the land described was the property of the crown, and was granted in 1846 to one J.: that J. afterwards conveyed to R. who brought ejectment against D., and recovered: that the plaintiff, in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges—and these damages he claimed from the defendant in this action as surviving executor of Winniett. *Held*, that under the facts alleged the action was not maintainable. And *quære*, as E. devised to R. only all his real estate, and this land, not being owned by him, was not therefore in words devised, whether B. could be treated as holding the covenant of Winniett as assignee, and as a covenant running with the land.—*Bown v. Hart*, 228.

CRIMINAL LAW.

See INDICTMENT.

CROWN LANDS AGENT.

Trespass—Right of crown agent to seize boards made from crown timber cut wrongfully.—*Held*, that under 12 Vic. ch. 30, a crown land agent is not authorized to seize boards made from crown timber cut wrongfully.—*Robinson, C. J.*, *dis-*

sentiente, who held that such timber might be seized in the shape of boards, and not merely while unmanufactured; and that, even if this were otherwise, the plaintiff in this case, on the facts stated, was not in a position to maintain trespass against the agent as a wrongdoer, and to recover from him the value of the boards. *Milner v. Clark*, 9.

CROWN OFFICE.

See PRACTICE, 3.

CUSTOMS ACT.

Customs Act, 10 & 11 Vic. ch. 31—*Construction of—Notice of claim—Value of vessel—Trespass.*—On the 7th of June the defendant, a collector of customs, seized the plaintiff's vessel for a breach of the revenue laws. The plaintiff sent a petition to the government, and on the 7th of July received an answer from the defendant, informing him that they had refused to interfere. On the 8th of July the plaintiff served a notice of claim.—*Held, first*, that the notice of claim required by sec. 48, of 10 & 11 Vic., ch. 31, to be given within one calendar month from the day of seizure, could not be waived by any representation of the defendant to the plaintiff. *Secondly*, that no notice having been given within the time allowed, the vessel was *thereby* condemned: and that by the act of seizure the plaintiff was deprived of his right of property, and therefore unable to maintain trespass. *Thirdly*, that in this case it was not necessary that the value of the vessel should be determined by the jury. *Dame v. Carberry*, 374.

DAMAGES.

See ADMINISTRATION—ASSESSMENT OF DAMAGES—ASSETS—EJECTMENT, 2—PARTNERS AND PART-

NERSHIP, 2—VENDOR AND VENDEE.

Trover—Special Damage,—1. Trover—The plaintiff offered evidence to prove that in consequence of being deprived of the tools for which this action was brought he had been prevented from undertaking work as a master-carpenter. This was laid in the declaration as special damage.—*Held*, that such evidence was rightly rejected. *Lott v. French*, 385.

2. In an action on the case for running down a ship—*held*, that the plaintiffs were entitled to recover for the cost of repairs done by the crew of their vessel. *Sutherland et al. v. Bethune*, 388.

DEBT.

Rent charge—Debt for arrears of.—Debt does not lie by the grantee of a rent-charge to issue out of lands, where there is no express covenant by the grantor to pay. *Quære*, if the grantee could bring debt, whether his assignee might do so. *Dougall v. Turnbull*, 121.

DEED.

See ASSIGNMENT.

Deed, construction of, as to land described—Presumption—Trespass *qu. cl. fr.* The plaintiff claimed under deeds from A. M. to S. M., in 1834, and from S. M. to the plaintiff in 1843. In 1829, A. M. had made a deed to his step-mother intended to be in lieu of her dower in his father's lands. It was clear by evidence at the trial, and by the mention made in this deed of the lands adjoining, that his intention was to convey the west part of lot No. 5; but the deed described the land as "*being composed of the easterly part of lot No. 5*" in the first concession of the said township of S., which said piece of land is butted and bounded, or may be

otherwise known as follows: commencing where a post has been planted in front of the said concession, at the *S. E. angle of the said lot*, then, "&c., giving courses which could be well carried out. It was proved, however, that S. M. had been in possession of the land in 1829, and that he and the plaintiff had held it ever since. The jury were told that the deed could pass no land which was not part of the easterly part of lot 5, but that, in confirmation of the long possession, they might presume a conveyance from A. M. to the plaintiff, which they did. *Held*, that the direction was right as to the construction of the deed, but that the presumption could not be confirmed, for such a conveyance would be inconsistent with what was done in 1834. *White v. Myers*, 574.

DELAY.

See PRACTICE, 1, 2, 4.

DEMAND OF POSSESSION.

Held, that under the evidence given in this case the plaintiff might maintain ejectment, without a demand of possession. *Robertson v. Slattery*, 498.

DEMURRER.

See AGREEMENT, 2.

DESCRIPTION OF PREMISES.

See DEED—SHERIFF'S DEED.

DIVISION COURT.

See EXECUTION, 2.

DOWER.

See INCONSISTENCY.

Dower of wife in lands of her first husband—how released.]—1. A woman under a second coverture cannot, without her husband's concurrence, release her right to dower in lands of her first husband; and *quære*, whether she could release this right by a conveyance

in accordance with the statutes for enabling married women to alienate their real estate. An action was brought in the names of the husband and wife, for dower claimed by the wife in lands of her first husband. After action brought, the wife executed a release to the defendant of her right, and went before a judge of a county court, and obtained a certificate of her examination and consent, according to the provisions of 50 Geo. III. ch. 10. *Held*, that such release was no bar to the action, being without the consent or concurrence of the husband, and not being a conveyance for any purpose contemplated by the different statutes for barring dower. *Howard v. Wilson*, 186.

Action of dower by husband and wife—Release by husband.]—2. Action for dower by S. and M. his wife, in land of M's former husband. The tenant pleaded a release under seal by S., of all his interest in the land. On demurrer this plea was held bad, as being no bar to the action. *Lawson v. Montgomery*, 528.

EJECTMENT.

See DEMAND OF POSSESSION—ESTOPPEL, 1—EVIDENCE 3, 9—INCONSISTENCY—TRESPASS.

1. *Quære* as to the effect of a misjoinder of plaintiffs in ejectment under the new act, 14 & 15 Vic. ch. 114. *Young et al. v. Scobie*, 372. (But see *infra* 3.)

Ejectment 14 & 15 Vic. ch. 114. Mesne profits]—2. A plaintiff in ejectment claiming substantial damages must give notice as the act directs, and proceed for such damages at the trial of the ejectment, otherwise he waives his claim, and can maintain no action afterwards.—*Curtis and wife v. Jarvis*, 466.

14 & 15 Vic. ch. 114.]—3. In ejectment under the late act one or more of several plaintiffs may recover. *Draper J.*, suggested, that under sec. 5 there may be a distinction between the *claim* and the *title*, so as to render it incumbent on claimants, when there is more than one, to point out in the writ on what or whose title they rely as giving them a right to the possession, and to prove *such title*, which may be either in one of themselves, or possibly in a third party. *Butler & McNiel v. Donaldson*, 643.

ELECTIONS.

See TOWN COUNCILLORS.

Contested election—Summons irregularly issued, effect as to subsequent proceedings.]—A summons having been obtained for the trial of a contested election, the relator, finding his proceedings irregular, notified the defendant not to appear, and that it was his intention to proceed *de novo*. *Held*, the objection urged against the election being a material one, that the relator was not precluded from a second application by his first ineffectual proceeding. *The Queen ex rel. Metcalfe v. Smart*, 89.

ESTATE.

See WILL.

ESTOPPEL.

Landlord and tenant—Estoppel.]

—1. A conveyed certain land to B., who conveyed to C., but remained in possession, professing to hold as C.'s tenant. C. conveyed to the plaintiff. The defendant claimed under a purchase at sheriff's sale, on an execution against A., and to be in possession through B., as his tenant; and he offered to prove that, having commenced an action of ejectment against B., the latter had agreed to become his tenant; and that the transactions between

A., B., and C. were fraudulent, the property remaining in A.; which evidence having been rejected, on the ground that the defendant could not rely upon B.'s possession, inasmuch as he was tenant to C., and had submitted to a distress for rent at his instance, the court granted a new trial.—*Tennery v. Burnham*, 298.

By-law.]—2. Debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made. *Held*, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson v. The Municipal Council of Port Hope*, 405.

3. The plaintiff having put in a will, in which the testator spoke of H. as his wife, was not estopped from denying the marriage. *George v. Thomas*, 604.

EVIDENCE.

See PROMISSORY NOTES, 4—CONSIDERATION—DAMAGES—DOWER—GUARANTEE, 1—MARRIAGE—NEGLIGENCE—NEW TRIAL—PRESCRIPTION—REPLEVIN—TENDER—TRESPASS—USURY—VENUE.

Trover for promissory notes not in defendant's possession, and not shewn to have been lost or destroyed—Secondary evidence admissible.]—1. Trover for promissory notes.—The plaintiff, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly, before any demand on the defendant or refusal on his part to return them. *Held*, that no notice to the defendant to produce was necessary; and (*Draper J.*, *dissentiente*,) that the plaintiff was

entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilly v. Fisher*, 32.

Evidence of party to the record rejected, he having heard other testimony, 14 & 15 *Vic. ch. 66.*]—2. One of several defendants was called as a witness in their and his own behalf. It appeared that he had been in court during part of the examination of another defendant in the cause. Notice had been given on a previous day of the assizes, that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses; the judge therefore rejected his evidence, and *held*, that he had authority to do so. *Winter v. Mixer et al.*, 110.

Ejectment—Statute of Limitations—Evidence.]—3. In an action of ejectment by a son against his father, the plaintiff claimed under a deed from the defendant. There was evidence to shew that since this deed the defendant had been more than twenty years in possession without any recognition of the plaintiff's right. The plaintiff, to repel this evidence, attempted to shew that during a part of that period the defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in the defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which the defendant claimed to have held adversely. At the foot, but not in the defendant's writing, was written the plaintiff's name, and the word

"copy." No proof was offered respecting this paper, except that it was in the defendant's handwriting. *Held*, on motion for a new trial, that such paper should have been received—*Draper, J.*, dissenting. *James McQueen v. Daniel McQueen*, 193.

4. *Held*, that the evidence given in this case was sufficient to prove executorship as against one, if not as against both defendants. *The Earl of Elgin v. Slawson and Horner, Executors of Wm. Swartz, deceased*, 289.

Trespass—Evidence—Title.]—5. Where in an action of trespass the plaintiffs at first relied upon a paper title, which turned out to be defective, they were afterwards allowed to give additional evidence of possession, and go to the jury upon that. *Boulton et al. v. Shand*, 351.

Collision of vessels—Proof of ownership.]—6. In an action on the case for running down a ship, it appeared that the plaintiffs, and no others, were owners of the vessel at the time of the collision, and in receipt of the profits; and that there was a deed of partnership executed by some of the owners, but not by others, which provided for the mode of transfer. *Held*, that the evidence given was sufficient proof of ownership as against a wrong-doer; and that it was not necessary to produce this deed. *Sutherland et al. v. Bethune*, 388.

Set-off—Defence admissible under replication of nunquam indebitatus.]—7. To a plea of a set-off on a note, the plaintiff replied *nunquam indebitatus*. *Held*, that under this replication he was at liberty to dispute his liability on the note, by shewing that it was given by him to the defendant, while they were in partnership, for the pur-

pose of raising money to pay off a debt of the firm. *Miller v. Thompson*, 391.

Pleading—Evidence — Payment into court.]—8. To an action of indebitatus assumpsit, defendant pleaded—1st. As to all but £106 1s. 11d. non assumpsit. 2nd. As to £28 12s. 6d. parcel, &c., payment—as to £77 9s. 5d. residue, &c., payment into court. Plaintiff took issue on the first plea; traversed the payment alleged in the second; and as to the third plea, took out the money paid into court. *Held*, that it was open to the plaintiff on the general issue to prove a charge not covered by the other pleas; and that the defendant, having sworn that he paid in nothing on account of that charge, was precluded from shewing that the other items which the plaintiff was entitled to, would not cover the money paid into court. *Taylor v. Flood*, 458.

9. In an action of ejectment upon a sheriff's sale under *fi. fa.* brought against the debtor, no evidence need be given of his title, nor need it be shewn that he was in possession of the premises. *Moran v. Patton*, 640.

16. *Vic. ch.* 19.]—10. The second clause of 16 *Vic. ch.* 19, by which plaintiffs and defendants may be compelled to attend as witnesses at the trial, does not apply when the parties reside out of the jurisdiction. *Patchin v. Davis*, 639.

EXECUTION.

See APPEAL, 2—PARTNERS & PARTNERSHIP, 2—SHERIFF'S DEED.

1. A rent-charge upon land for the life of the grantee is seizable by the sheriff under an execution against lands. *Dougall v. Turnbull*, 121.

13 & 14 *Vic. ch.* 53, secs. 53, 55,

87, 97.]—2. The bailiff of a division court from which a warrant of execution issues, has authority to execute it in any other county in which the defendant has goods. *Chrysler v. Serpell*, 647.

EXECUTOR.

See ASSETS—EVIDENCE. 4—LANDS—PLEADING, 5—VERDICT, 1—WILL, 1.

FI. FA.

See PRACTICE, 3.

FIXTURES.

A barn, whether affixed to the soil or not, is, as between vendor and vendee of the land, a part of the freehold, and not a personal chattel for which an action of trover will lie.

G. died, having a right of pre-emption to certain lands, his executors disposed of this right to the plaintiff, who received possession of the land, and of a barn which was supposed to be on it. It turned out, however, that the barn stood partly on a highway, and partly on the defendant's land. The defendant removed it, and the plaintiff brought trover. *Held*, that the action would not lie. *Bunnell v. Tupper*, 414.

FORMER RECOVERY.

See PLEADING, 6, 9, 12.

FRAUDS (STATUTE OF).

Whether agreement not to be performed within a year.]—The plaintiff declared that one B. S. on the 1st of June, 1839, in consideration that the plaintiff would convey to him a certain lot of land, agreed with the plaintiff "that he, the said B. S., his executors or administrators, would well and sufficiently provide, furnish, and supply the plaintiff with good and sufficient food, board, washing, and lodging, during the term of the natural life of the plaintiff." *Held*, not an agreement within the fourth section of

the Statute of Frauds, as by its terms it would not necessarily endure beyond a year. *Slater v. Smith et al., Executors of Smith, 630.*

FRAUDULENT DEEDS AND ASSIGNMENTS.

*Deed of assignment—Provisions in—Change of possession only of part of the goods assigned, effect of as to registration—12 Vic. ch. 74, 13 & 14 Vic. ch. 62.]—Interpleader—*The plaintiffs claimed under a deed of assignment by M., the execution debtor, to them of all his real and personal property, upon certain trusts.—This deed provided for the payment, in the first place, to certain privileged creditors of the sums mentioned; and next, to pay a ratable proportion to the same creditors of the residue of their demands; and also a ratable proportion to all creditors who should within two months come in and execute the deed. There were also provisions, that if the trustees should think it advisable, and a majority in value of the creditors signing the deed, should consent, they might carry on the business for the benefit of such creditors, employing M. for this purpose, and making him an allowance: that from time to time out of the proceeds realized they might purchase new stock, *but the business to be wound up, at all events, within two years*; and that the trustees might permit M. to use such portion of his household furniture, for such time, and on such terms as they should think proper. The furniture was left in M.'s possession, being used in rooms over the shop, where he continued to live. The deed was registered with the clerk of the county court, but was not accompanied by an affidavit verifying any debt. *Held, first,—*that it was properly left to

the jury to say whether they believed that the assignment was in truth made for the benefit of the creditors, and that the plaintiffs had taken possession and were acting *bona fide* under it. *Secondly*, that none of the provisions above mentioned could be considered as illegal, or affording evidence of fraud. *Thirdly*, that although the deed, for want of such registry as the acts direct, could have no effect with respect to the furniture, of which there had not been an actual and continued change of possession, yet that it was not thereby avoided *in toto*, or rendered invalid as to those goods which went into and remained in possession of the plaintiffs. *Taylor et al. v. Whittemore et al., 440.*

GRANT.

*Presumption of.]—*See "Prescription" 1.

GUARANTEE.

See NEW TRIAL, 3.

*Guarantee—Evidence—Consideration.]—*1. In an action on the following guarantee—"I do hereby promise to guarantee the payment of any sum to S. S. that the arbitrators chosen by himself and F. S. & Co.—namely, P. C., J. W., W. B. W., and J. F., and a fifth person to be chosen by them—may award to him, the said S. S., in the arbitration now pending between the said parties," dated the 29th of September, 1851—the declaration stated, that, in consideration that the plaintiff, at the defendant's request, would leave certain differences then existing between the plaintiff and F. S. and P. S., to the award of, &c., the defendant promised the plaintiff to pay him any sum that might be awarded to him by such arbitrators. A bond of submission to the above arbitration was signed by F. S. &

Co., on the 3rd of October, 1851. *Held*, the evidence shewing that the arbitration was not conclusively agreed upon when the guarantee was signed, that the guarantee sustained the consideration as alleged, and that the words, "now pending," did not necessarily imply a past consideration. *Shaw v. Coughell*, 117.

Commission—Consideration—Application to add a plea.—2. Assumpsit on a guarantee. The declaration stated, that, on, &c., in consideration that the plaintiffs had paid the defendant five shillings, and would pay and advance, at the request of the defendant, to S. and J. a sum not exceeding £1250, the defendant then guaranteed and promised the plaintiffs that S. and J. would ship to the plaintiffs a sufficient quantity of lumber to pay to the plaintiffs the said sum of £1250 by the sale thereof, and that in default of such shipment by the said S. and J., the defendant would repay to the plaintiffs all such sums as they should advance, not exceeding £1250. The guarantee produced was as follows:—"Whereas H. H. & Co., of Albany, have authorized S. and J., of Houghton, Canada West, to draw on them to the amount of \$5000; and whereas the said S. and J. promise and agree to ship to the said H. H. & Co. a sufficient quantity of lumber, in the months of May, June, July, and August next, to pay the same. Now, therefore, in consideration of one dollar to me in hand paid, I hereby guarantee to Messrs. H. H. & Co., that the lumber shall go forward agreeably to contract, and in default of the same, I will be responsible to them to the amount of the advances, the same not exceeding \$5000. *Held*, that the defendant was not entitled to

credit as against his guarantee for the gross value of the lumber sent, but that the plaintiffs were entitled to deduct their charges. *Held* also, that the declaration, as to the statement of the consideration, was sufficiently supported by the proof. *Higby et al. v. Cummings*, 222.

HIGHWAY.

See PLEADING, 2.

1. Under 12 Vic. ch. 81, a municipal council may convey a highway as soon as it is abolished by their enactment; and it is not necessary for them to enclose it so as to prevent persons from passing.

Held that the council might stop up the road in this case, though it was not in contemplation to substitute another for it. *Johnston v. Reesor et al.*, 101.

2. *Semble*, a common and public highway is not an incumbrance within the meaning of the covenant for quiet enjoyment. *Moore v. Boulton*, 140.

3. Municipal councils have authority to close a road, however long in use. *Fisher v. The Municipal Council of Vaughan*, 492.

Alteration of road—Circumstances necessary to authorize conveyance of old allowance by surveyor—50 Geo. III. ch. 1, 4 Geo. IV. secs. 2, ch. 10.]—4. In 1812 a report was made by J. M., surveyor of highways, reciting an application of twelve freeholders as required by 59 Geo. III. ch. 1, and stating that he had "examined the situation of the land for a new road in the township of S., leading from lot No. 16 in the third concession across lots No. 17 and 18 in the said third concession until it intersects the forty feet road between 18 and 19; then following the forty feet road until it intersects the lane in front of T.

A.'s house; then across the different lots in the third concession aforesaid, until the said new road intersects the forty feet road between Nos. 30 and 31." This report was afterwards allowed by the Quarter Sessions, as appeared by a minute indorsed on the report, and signed by the chairman. P., the owner of lot 29, went before the Sessions to oppose the change in the road, but withdrew his opposition on being told that he would get the old allowance in lieu of the ground taken from him by the new road. No conveyance was made till 1831, when the surveyor of highways for that year executed a deed to P. for the old allowance, which deed was expressed to be made under the authority of 50 Geo. III. ch. 1. F., the owner of the adjoining lot in the second concession, having thrown down the fences erected by P. to enclose the old allowance, was sued by him in trespass, and justified on the ground that the *locus in quo* was a common highway. F. then procured P. to be indicted for obstructing a highway, being this same road allowance. *Held*, that the conviction could not be supported, for it was not shewn that any order had been made, or notice given, as required by 9 Vic. ch. 8. *Held*, also, (Robinson, C. J., *dissentiente*), that there was not sufficient in the report, or the evidence given, to authorize the surveyor to convey, as it did not appear that the old allowance had become unnecessary for a public highway:—and that the action of trespass could therefore not be maintained. *Semble*, that it should also have been stated that the old road was *one then in use*, for that the surveyor has authority under the statute only to convey land over which there was an actual highway. *Purdy v.*

Farley and Regina v. Purdy, 545.

INCONSISTENCY.

Inconsistent verdicts in different actions, effect of—Witness.]—Where in an action of ejectment brought by a purchaser at sheriff's sale the jury had found that the debtor was living when the *fi. fa.* bore teste, and therefore sustained the plaintiff's claim; and in a subsequent action by the debtor's widow for dower damages were given for detention, *on the ground that the husband died seized*, the court refused, on account of this inconsistency, to set aside the verdict, which was not clearly against evidence.

In an action for dower by husband and wife, the wife is a competent witness. *Cadman and wife v. Strong*, 591.

INDICTMENT.

See CERTIORARI.

1. An indictment for receiving stolen bank notes did not conclude *contra formam statuti*: *Held*, bad. *Regina v. Deane*, 464.

2. An indictment for obtaining money under false pretences must conclude *contra formam statuti*, and must state to whom the money belonged. *Regina v. Walker*, 465.

Bank bills—Goods and chattels—Surplusage.]—3. An indictment charging the prisoner with stealing bank bills "of the moneys, goods, and chattels of one T. B." was held good, as the words "of the moneys, goods, and chattels" might be rejected as surplusage. *Regina v. Saunders*, 544.

INNS.

See MUNICIPAL CORPORATIONS, 2.

INSOLVENT AND INSOLVENCY.

Insolvent Debtors' Act, 8 Vic. ch. 48, sec. 24—*Pleading.*]—To an action on a promissory note the defendant pleaded that after the

contracting of the said debt, and before the commencement of the suit, a petition for protection from process was duly, and according to the form of the statute, presented by him to a judge of a county court, and filed in the Insolvent Court; and that thereupon, afterwards, and before action brought, a final order for protection and distribution was made by, &c.; and that the said debt, and every part thereof, was contracted before the date of the *filing* of the said petition in the said Insolvent Court. The plaintiff replied that the promise in the declaration mentioned was made, and the cause of action accrued, after the petition was *presented*—concluding to the country. *Held*, on demurrer, replication bad; plea good. *March v. Alexander*, 435.

INSURANCE.

Mutual Insurance Company—6 Wm. IV. ch. 18, sec. 2.—Statement of title.—1. The defendants, in applying for an insurance with the plaintiffs, had represented themselves as owners of an unincumbered estate in fee simple in the premises to be insured. It appeared that they were interested only as mortgages in fee, and for a less sum than that insured for. *Held*, that they had not represented their title truly, as the statute requires, and that they could not recover on the policy. *Brown et al v. The Gore District Mutual Insurance Company*, 353.

Application to insure—Policy avoided by misrepresentation of title.—2. The plaintiff's application for an insurance with defendants contained the following questions and answers: *Question*—"Occupied by applicant or tenant?" *Answer*—"tenant." *Q.*—"Title by deed, or how?" *A.*—"Deed." *Q.*—"In-

cumbered or not; if not, say no?" *A.*—"No." The plaintiff afterwards made affidavit "that he is the *bona fide* owner of the said property and of the said policy; that the said property is not and was not in any way incumbered by mortgage or otherwise." It appeared that the plaintiff was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price: and that there was a mortgage from M. to one H. including the property insured. *Held*, that (irrespective of the mortgage) the plaintiff had misrepresented his title, and could not recover on the policy. *Walroth v. The St. Lawrence County Mutual Insurance Company*, 525.

INTERLOCUTORY JUDGMENT.

Where interlocutory judgment had been signed, and a summons to set it aside discharged, and damages assessed, the court refused to entertain an application to set aside the declaration for irregularity, on account of its having laid the venue in a county different from that in which the summons was taken out.

It is not an inflexible rule, that on motion to set aside an interlocutory judgment, the court will not receive affidavits in contradiction of the general affidavit of merits. *Wilson v. The Municipal Council of the Town of Port Hope*, 405.

INTERPLEADER.

Interpleader—Trespass maintainable against the execution creditor.—The claimant of goods seized, by accepting an interpleader order, does not waive his right to bring trespass against the execution creditor, for seizing and selling his goods.

A. having seized goods of B., which were claimed by C., a feigned issue was directed by the Court of Common Pleas between A. and C. to try the right. While this was pending, C. brought an action of trespass in this Court against A. for taking the goods, and carried it down to trial at the same assizes with the interpleader issue. The learned Chief Justice, at Nisi Prius, refused to direct a nonsuit on the ground that such action could not be maintained during the pendency of the feigned issue, and the plaintiff having succeeded on that issue, and having established a claim to damages in this action, was held clearly entitled to retain his verdict. But *semble*, that such suit should not have been brought until the decision of the interpleader order, and that the defendant might have obtained a stay of proceedings on application to the proper court.—*Cotton v. Stokes*, 262.

JURISDICTION.

Of court over resolutions of municipal councils.—See "Municipal Corporations," 1.

LANDLORD AND TENANT.

See ESTOPPEL, 1.—REPLEVEN.

Landlord's rights. LANDS.

See PLEADING, 5.

5 Geo. II. ch. 7.—*Lands assets for unliquidated damages.*—Under 5 Geo. II. ch. 7, lands are assets in the hands of executors for the payment of unliquidated damages in an action of covenant, and not merely for debts. *Sickles v. Assestine et al., Executors of John Snyder, deceased*, 203.

LAND SALES ACT.

See RECEIPT.

The agent for disposing of the Indian Lands on the Grand River does not come under the designa-

tion of a district agent of the Commissioner of Crown Lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sale Acts. *Young et al. v. Scobie*, 372.

LARCENY.

See INDICTMENT.

LEASE.

See ASSIGNMENT, 1. — REGISTRATION.

Lease—Construction of, as to payment of rent.—A. leased certain premises to B., to hold, from the 15th of September, 1846, for six years, at a yearly rent: the first payment to be made on the 1st of March, 1848, and the succeeding yearly payments to be made on the first day of March *during the lease*. *Robinson, C. J.*, considered that the rent for the sixth year fell due at the expiration of the last year's occupation, viz., on the 1st of September, 1852. *Burns, J.*, was of opinion that the last year's rent should be accelerated, and therefore that two years' rent were due on the 1st of March, 1852. *Neal v. Scott*, 361.

LIBEL AND SLANDER.

Libel—Immaterial variance.—

1. The libel as set out in the declaration was as follows: "We had thought that the hellish malignity and murderous disposition which the tory party had been accustomed to exhibit in past times, would not be witnessed in the election contests of the present day. *We supposed that they had become aware of the fact, &c.* The last sentence as proved was, "We supposed that they had by *this time* become aware of the fact." *Held*, that the variance was immaterial. *Smiley v. McDougall*, 113.

Slander.—2. *Held*, that the declaration charged a good cause

of action, and with sufficient certainty. *Miller v. Houghton*, 348.

LIMITS.

Recognizance of bail to the limits, how forfeited.]—Where a defendant on bail to the limits has broken his recognizance, it is no defence that he was informed and believed that the place he went to was within his limits, unless it can be shewn that such was the general impression, or that the boundary was disputed. *Hedden v. Gregory et al.* 334.

LIMITATIONS (STATUTE OF.)

See EVIDENCE, 3—ORDINANCE.

Statute of Limitations—Whether plaintiff relieved from, by issuing of first writ, though defendant not served—Right of plaintiff to credit a set-off against items barred—Effect of omission of proviso in 13 & 14 Vic. ch. 61—Retrospective operation of that act.]—1. Where an action for services rendered was commenced by writ of summons, which was succeeded by an *alias* and *pluries* writ, each of which was placed in the sheriff's hands, but not served or intended to be served, and the defendant was afterwards served with an *alias pluries* summons, it was held at *Nisi Prius* that the Statute of Limitations would bar only such demands as had accrued six years before the issuing of the first process.

The plaintiff wrote to the defendant, who had a demand against one C., saying that C. had asked him to settle the claim with the defendant, and requested him, therefore, to charge it to his (the plaintiff's) account. It was not proved that any account had been rendered by the defendant, in which he took credit to himself for this as a payment on any par-

ticular account. *Held*, that this must be considered merely as an item of set-off, and not as a payment; and, therefore, that the plaintiff was not entitled to credit it as a payment of that part of his demand which was barred by the statute. *Semble*, that the omission in our act 13 & 14 Vic. ch. 61, sec. 1, of the proviso which is contained in sec. 1, of the English stat. 9 Geo. IV., ch. 14. will not operate to take away from the fact of payment any effect which it would have had before.

The statute 13 & 14 Vic., ch. 61, has a retrospective effect. *Notman v. Crooks*, 105.

13 & 14 Vic. ch. 61, *retrospective effect of—Objection allowed, not taken at the trial.*]—2. The plaintiff sued, in 1849, on a debt which accrued more than six years before. A new trial was granted in 1850, but the second trial was delayed until 1852. *Held*, that the 13 & 14 Vic. ch. 61, which came into operation in January, 1852, precluded him from recovering on a verbal promise. The Court under the circumstances allowed the defendant to claim the benefit of that statute, though he had not insisted upon it at the trial, but had objected to the sufficiency of the evidence on other grounds. *Grantham v. Powell*, 306.

Ejectment—Statute of Limitations—Evidence—Dispossession.]—3. One Lee, in 1822, obtained a patent for a lot of land on which he had previously lived for several years; but before the patent issued he had removed to another part of the country. After his removal one M. made some agreement with him to purchase the lot, and went up and lived on it till 1823, when he died. M.'s wife, soon after his death, disposed of the place, or her right in it to W. B.,

the defendant's father, who occupied the adjoining lot. It did not appear that M. ever had any interest beyond an agreement to purchase, or what were the conditions of his agreement, or what his wife received from W. B., or that she gave him a writing of any sort. W. B. built a house on the lot, which was occupied by himself, his widow and sons, in succession, until 1825, after which it remained vacant. The defendant lived on the lot adjoining, and there was conflicting testimony as to the nature of the possession held, and the acts of ownership exercised by him, over the land in question, up to the time of this action. The above facts were relied on as entitling him under the Statute of Limitations.—The plaintiff proved that in 1824 Lee conveyed to S., her husband, under whom she claimed as devisee, that S. had gone twice expressly to see the land, in 1830 and 1832, on each occasion taking with him persons to whom he proposed to sell; that on the first visit they saw the defendant, who made no objection when told by S. that he had come to take possession, and that he was going to sell the property; that on the second visit the defendant agreed to purchase the land from S., but afterwards failed in the payments which he had promised to make. *Held*, that the tenancy by the defendant up to 1830 could be considered only as a tenancy at will, as the widow of M, under whom he claimed, could, for all that appeared, have given no better right; and that the entry in 1830 was sufficient to determine the will; that the defendant's agreement to purchase in 1832 constituted a new tenancy at will, and the statute began to run at the expiration of a year

from that time, that it should have been left to the jury to say whether, under the evidence, the possession held by the defendant was of that constant and visible kind which would be sufficient under the statute. And *semble*, that the plaintiff was, at all events, entitled to a verdict; for either S. was never in possession in respect to the patent under which he claimed, and therefore could not be said to have become dispossessed, in which case the statute never began to run against him; or, if in possession at all, it must have been by virtue of his actual entry in 1830 and 1832, since which times twenty years had not elapsed. *Doe. dem. Shepherd v. Bayley*, 310.

Proviso in 4 Wm. IV. ch. 1, sec. 17.—4. A person holding a bond for a deed from the patentee of the crown is not so entitled to the land," that his knowledge of an adverse possession for more than twenty years will take the case out of the proviso in 4 Wm. IV. ch. 1, sec. 17. *Johnson et al. v. McKenna*, 520.

MAIL.

See **TOLLS**.

MALICIOUS ARREST.

Malicious arrest—probable cause—Perverse verdict.—Case for malicious arrest.—The defendant gave abundance of evidence to shew reasonable cause for believing that the plaintiff was about to leave the country. The learned judge left it to the jury to say whether they believed that the defendant received the information stated to have been given, and whether he thought it to be true that the plaintiff was about to leave the province. *Held*, that the jury should have been told that the plaintiff had not proved a want of

probable cause. *Smith v. McKay*, 412.

Held, that upon the evidence this case should not have been given to the jury as one in which they had a duty to perform, which might lead them to find a verdict one way or the other; but that it should have been ruled by the learned judge that the case failed, for that probable cause was shewn to his satisfaction, of which the law required that he should be the judge. *Smith v. McKay*, 613.

MANDAMUS.

See TAXES.

MARRIAGE.

Evidence of Marriage—Illegitimacy—Presumption rebutted.]—A presumption of marriage arising from reputation may be rebutted by proof that the woman formerly lived with another man in such a manner as to raise the same presumption of marriage with him. *George v. Thomas*, 604.

MASTER AND SERVANT.

Yearly hiring—Servant leaving without consent.]—When a person hired by the year departs without consent before the year is up, he forfeits his wages; and it is important that this law should be enforced. Where the plaintiff had taken such a course, and afterwards sued for his wages, and a verdict was given in his favor for £25, the court granted a new trial without costs, though it appeared that the defendant had offered him that sum to settle the suit. *Blake v. Shaw*, 180.

MONEY PAID.

Money paid to defendant's use—When maintainable.]—A *ca. sa.* against the defendant in this suit was given to the deputy sheriff, and a warrant made to the plaintiff, a bailiff, to execute it; he

arrested both defendants, and one escaped on his way to the gaol.—The sheriff sued his deputy, who recovered over against the bailiff, and the bailiff then sued both defendants as for money paid to their use. A nonsuit was directed on the ground that the payment by the sheriff satisfied the plaintiff in the original suit, and therefore this plaintiff could not recover as for money paid to the use of the defendants, because their debt was satisfied before. *Held*, that the nonsuit on this ground was wrong, *Quære*, however, whether under the facts proved an assent to the payment could be implied on the part of both defendants, so as to sustain this action. *Sumner v. Kirkpatrick and Campbell*, 483.

MORTGAGE.

See CHATTEL MORTGAGES—REGISTRATION.

MUNICIPAL CORPORATIONS.

See BY-LAW.—CLERK OF THE PEACE.—HIGHWAY.—PRESCOTT & RUSSELL (UNITED COUNTIES OF.—REGISTRY OFFICES—TAXES—TOWN COUNCILLORS.

Illegal resolution, acted upon and therefore not rescinded.]—1. The court refused to rescind a resolution of a municipal council, authorizing the reeve of the township to draw a draft on the treasurer in favour of certain members of the council, for their services as such up to the 13th of August, 1851—because such resolution was spent and inoperative; and therefore, although illegal, no object could be gained, or redress afforded by setting it aside. *Daniels v. The Municipal Council of the Township of Burford*, 478.

Rules for regulation of inns—Authority of Municipal Council.]—2. Upon motion to quash the following rules prescribed in a by-

law:—6. "Every inn-keeper shall shut up his bar-room, the outer as well as the inner doors, each night at eleven o'clock, and keep them closed during the night, except on Saturday night, when they shall be closed at the same hour, and not opened again until four o'clock on Monday morning, except for the entrance of himself or servant—*during which time no spirituous or intoxicating liquors are to be sold or furnished to any one.*" 7. If any dispute shall arise between the guests and the inn-keeper, it shall be referred to any justice of the peace, whose decision shall be final as to the *quantum* of the charge by his verbal order." *Held*, that the Municipal Council had no power to make the order as to spirituous or intoxicating liquors contained in the sixth rule, and that the seventh rule was also an enactment beyond their authority. *Baker v. The M. C. of Paris*, 621.

NEGLIGENCE.

See PROMISSORY NOTES, 1.

Action by carriers against stage coach.—*Held*, in this case, that negligence and improper conduct were sufficiently shewn by the evidence. *Gunn v. Dickson et al.*, 461.

NEW TRIAL.

See MASTER AND SERVANT.

New trial—Costs of, where verdict perverse.—1. When the question for trial depends upon established rules of law, and the jury, being properly directed, give a verdict in opposition to the charge, the party injured is entitled to a new trial *without costs*. *Logan v. Ryan*, 15.

2. The court, under the circumstances of this case—the pleadings having been before them on demurrer—refused a new trial, with a view to an amendment of the

pleadings. *McKechnie et al. v. McKeyes*, 37.

3. The court, under the circumstances of the case, and facts shewn on the affidavits, refused a new trial, in order to allow the defendant to put in a plea of discharge, on the ground of extension of time given to the principals. *Higby et al. v. Cummings*, 223.

Malicious arrest—Perverse verdict.—4. Second new trial granted, a verdict having been twice perversely rendered for the plaintiff. *Smith v. McKay*, 412.

5. The court refused to disturb a verdict for the defendant, though the plaintiff was strictly entitled to nominal damages. *Curtis and Wife v. Jarvis*, 467.

6. Second new trial granted, a verdict having been twice found against an officer of the Court of Chancery on insufficient evidence. *Sutherland v. Black*, 515.

Malicious arrest—Three perverse verdicts.—7. In an action for malicious arrest the Court granted a third new trial, three verdicts having been perversely rendered against the defendant. *Smith v. McKay*, 613.

NISI PRIUS.

See AMENDMENT.

NOTICE.

By bank, to guard against responsibility, effect of.—See "Promissory Notes," 1.

NOTICE OF ACTION.

Notice of action—Replevin.—1. The statute 14 & 15 Vic. ch. 54, requiring notice of action, does not extend to actions of replevin. *Semble*, that the plea of *non cepit* cannot be considered as the general issue in replevin; and, therefore, that if a notice of action had been necessary in this case, the want of it could not have been taken advan-

tage of under this plea. *Folger et al. v. Minton*, 423.

Notice of action—13 & 15 Vic. ch. 54, effect of.]—2. *Quære*, whether the 14 & 15 Vic. ch. 54, can be applied against a plaintiff in any case where the officer protected by the act had no such protection before, and where the act was committed by him before the statute was passed. This question was raised, but not decided, as it appeared that the defence was not admissible—the plea of “not guilty” not being marked “by statute.” *White v. Clarke*, 490.

This same point has been again brought up in this case, and decided (August 30th) in the negative; *Draper, J.*, dissenting.

NOTICE TO PRODUCE.

See EVIDENCE, 1.

NUL TIEL RECORD.

Nul tiel record.]—A defendant in assumpsit pleaded in abatement a former action pending, and the plaintiff replied *nul tiel record*. The declaration in the first action contained only a count for money had and received; in the second a count on an account stated was added. *Held*, that the replication was not supported, and that the defendant was entitled to judgment. *Bain v. Bain*, 572.

ORDNANCE.

Officers of Ordnance, limitation of actions against.]—Actions against the officers of Her Majesty's Ordnance, as incorporated under 7 Vic. ch. 11, are subject to the limitation provided for in 8 Geo. IV. ch. 1. *Denaut v. The Principal Officers of Her Majesty's Ordnance*, 189.

OWNERSHIP.

Proof of.]—See “EVIDENCE,” 6.

PARTITION.

Application for partition—2 W.

IV. ch. 35, sec. 6.]—1. Where the property was not indivisible in its nature, consisting of several lots of land, but the freeholders returned that it was desirable that no division should take place, but that the whole should be taken by one of the parties entitled; or otherwise, sold, there being more than eighteen claimants; the court approved of the return. *In re Dennie et al.*, applying for partition, 104.

Time for service of notice.]—2. A writ of partition cannot be ordered unless notice has been given forty clear days before the term; therefore, where the service was made on the 21st of July, and the term began on the 30th of August, it was held insufficient. *In re Loney*, applying for partition, 305.

PARTNERS & PARTNERSHIP.

Fraudulent sale of partnership effects by one partner—Trove by co-partner against the vendee.]—1. One of two partners may recover in trover the value of partnership goods from the vendee of his co-partner, where there has been a fraudulent collusion between the vendor and vendee; but each partner has a power of sale over the effects of the firm, and the mere omission of the vendor to consult his co-partner is no ground of fraud as against the vendee. *Held*, therefore, that in this case the plaintiff could not recover the value of the partnership goods. *Fox v. Rose*, 16.

Partnership—Ft. fa.—Duty of sheriff.]—2. The sheriff, on a writ of *ft. fa.* against B., one of a firm, seized his share of the partnership property. B.'s partner and D. R. & Co. notified the sheriff not to sell, and before any sale had been made D. R. & Co. placed in his hands an execution

against the firm. Upon this last writ the sheriff sold the whole of the partnership effects, which realized only a small part of the claim; and to the first writ he returned *nulla bona*. B. had no property except his interest in the firm; and it was admitted that when the first writ was delivered to the sheriff the partnership effects were insufficient to meet their debts. *Held*, that the sheriff was not liable for a false return to the first writ, even for nominal damages. *Rhntoff v. Dickson*, 428.

PAYMENT.

See LIMITATIONS (STATUTE OF)—
MONEY PAID.

PAYMENT INTO COURT.

See EVIDENCE.

PENALTY.

Sum in which parties to an agreement were mutually bound, held a penalty, not liquidated damages.—

1. The plaintiff and the defendant entered into an agreement, by which the defendant was to build for the plaintiff a grist mill, according to certain specifications, for the sum of £1150; "and for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to those presents bind themselves, each unto the other, in the penal sum of two hundred and fifty pounes currency, as fixed and settled damages to be paid by the failing party." *Held*, that the sum of £250 was a penalty and not liquidated damages, and that it could not, therefore, be made the subject of set-off. *Brown v Taggart*, 183.

2. Sum stipulated to be paid per week for delay in completion of building agreement, held liquidated damages, not a penalty. *Gilmour v. Hall & Platt*, 309

PLEADING.

See AGREEMENT, 2. — ASSETS. — PROMISSORY NOTES, 3. — EVIDENCE, 7, 8. — GUARANTEE. — INSOLVENT AND INSOLVENCY. — NOTICE OF ACTION. — NULTIEL RECORD. — PRESCRIPTION. — RECOGNIZANCE. — REPLEVIN.

Bond for administration of intestate's effects—Pleas to action on.—

1. Debt on an administration bond—breaches assigned in the declaration. Pleas—1. That after the 1st of November, 1833 (the day named in the condition on which the administrators were to render their account, to wit, on, &c., and as soon as they reasonably could the administrators rendered a just and full account, which was allowed by the Judge of the Surrogate Court. 2. Performance generally. 3. That on the 1st of November, 1833, there was no sitting of the Surrogate Court to which the administrators could have rendered their account. *Held*, on demurrer, pleas bad. *The Earl of Elgin v. Crosby*, 97.

Highway—Right of Municipal Council to stop up, and to convey—Pleading.—2. To an action for obstructing a highway, the defendants pleaded, admitting that there was once a legally established highway through the *locus in quo*, but averring that before the obstruction complained of it had ceased to be a highway, in consequence of certain proceedings taken by the municipal council of the township, and which were set out in the plea. *Held*, as to matters stated as inducement in such plea, that it was unnecessary to negative the fact of the road passing through ordnance property, or that it was within the limits of any village, town, or city; and that the municipal council was sufficiently desig-

nated as "the municipality. *Johnston v. Reesor, Johnston et al.*, 101.

Action on covenant for quiet enjoyment.]—3. The plaintiff sued the defendant on the usual covenant for quiet enjoyment contained in a deed, alleging as a breach that before the conveyance there was, and still is, a common and public highway over a portion of the land conveyed. *Held*, on demurrer, declaration bad; for the exception in the covenant for title of any limitation, proviso or condition, contained in the original grant from the crown, extends equally to the covenant for quiet enjoyment, and it was not averred that no highway was reserved in the original grant. *Moore v Boulton*, 140.

Set-off — Pleading] — 4. The plaintiff and defendant entered into an agreement by which the defendant was to build for the plaintiff a grist mill, according to certain specifications, for the sum of £1150; "and for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of two hundred and fifty pounds, currency, as fixed and settled damages to be paid by the failing party." The defendant, after setting out the agreement, averred that he had built and finished the mill as he had contracted to do, and that the plaintiff was indebted to him in the price agreed upon to be paid. In reply, the plaintiff merely traversed that the defendant had so built and finished the mill, and, on demurrer, the replication was held bad. *Brown v. Taggart*, 183.

5. To an action on a covenant for title by the assignee of the bargainee against the executors of

the covenantor, the defendants pleaded that they had fully administered all the testator's goods. The plaintiffs replied, lands remaining as assets in the hands of the defendants, liable to be seized and sold to satisfy the damages sustained by reason of the breach of covenant declared upon; The defendants rejoined, that they had fully administered all the lands of the testator which had come to their hands, and that they had not at the commencement of this suit, or at any time since, any lands, &c., which were of the testator at the time of his death, in the defendants' hands, as executors to be administered. The plaintiffs demurred to the rejoinder, which was held clearly bad. The replication, being excepted to, was upheld on the authority of *Gardiner v. Gardiner*, 2 O. S. 520. [*Draper, J.*, yielded to the authority of that and other cases decided in this court, and therefore concurred in the judgment, though he considered the replication bad, for the reasons stated.] *Sickles v. Asselstine et al., Executors of John Snyder, deceased*, 203.

Bond — Condition — Necessity of request — Prior action in county court — Demurrer.]—6. Debt on bond, conditioned that the defendant should "pay to the plaintiff £43 15s. in building stone, at 15s. per cord, to be delivered for that sum in the town of Hamilton, at such times and in such places as should be required by the plaintiff: twenty cords to be delivered by the 20th of September then next, and the remainder in one year." The defendant pleaded, that from the making of the bond until the expiration of one year, he had always been ready and willing to deliver the said stone at such

times and places as should be required by the plaintiff, &c.; yet that the plaintiff did not, within one year from the date of the bond, require him to deliver the said stone or any part thereof.

Held, on demurrer, that the plea offered a good defence. In a second plea, the defendant averred that the plaintiff had sued him in a county court for the same cause of action as in this suit; and set out the proceedings there, which shewed that a plea in substance the same as that above mentioned was pleaded, and another precisely the same; that the plaintiff replied to the first of these pleas, and demurred to the second; and that the defendant demurred to the plaintiff's replication, and had judgment on both demurrers. To this plea the plaintiff replied, that the judgment recovered in the county court was upon points of form, and not on the merits, and offered to verify this by the record. The defendant demurred to this replication, and it was held bad; the effect of the judgment against the plaintiff's demurrer being to shew that the plea was a good defence. *Stinson v. Branigan*, 210.

Debt — Pleading — Certainty — Agreement — Plea objected to as amounting to the general issue.]

7. Debt for work and labour. The defendants pleaded, as to part of the sum demanded, that the work was done and materials provided under a certain contract between the plaintiffs and defendants, by which it was agreed that in case all the work should not be done on the day appointed in the agreement therefor—to wit, on the 15th of February, 1851—the plaintiffs would permit the defendants to deduct and retain the sum of £6 per week from the money agreed upon to be paid for every week

beyond the time allowed; that the plaintiffs did not complete the work until thirty weeks had elapsed beyond the time appointed, wherefore the defendants became entitled to deduct a sum exceeding that in the introductory part of the plea mentioned. *Held*, on demurrer, plea bad, for the *different* reasons given by the court. *Worthington et al. v. The Municipal Council of the County of Haldimand*, 217.

Covenant—Agreement to construct road-bed of railway—Assignment of breaches — Demurrer—Certainty—Engineer's certificate—Necessity for statement of name—Dismissal of contractors, how pleaded.]

8. The plaintiffs sued in covenant, on an agreement by which they had contracted to construct for the defendants the road-bed on a certain section of a line of railway. It was provided that the whole should be in strict conformity with the specifications of the defendants' chief engineer; that the payments stipulated for should be made upon his written certificate; that in certain events he should have power in his discretion to take the work out of the plaintiffs' hands, and to re-let the same to others at the plaintiffs' expense—in which case the plaintiffs should forfeit all moneys due to them on account of the contract. Specifications were added of the manner in which the several kinds of work should be performed, in which it was expressed that the foundation should be as of such description as the work should require, and might in some cases be constructed by means of piles driven in and arranged according to the direction of the engineer. In a copy of prices annexed to the agreement, and which had been accepted by the plaintiffs, one item was "Price

for piling—Piling in foundations, per lineal foot, 30 cents.”

In assigning the first nine breaches the plaintiffs averred that, *although* they did, &c., drive certain large quantities of piles, to wit, (setting out the number in lineal feet, and *although* the chief engineer did, before taking the working out of the plaintiffs' hands, to wit, on, &c., by his written certificate, specify the amount of the said piling, yet that the defendants had not paid therefor according to the rates agreed on. *Held*, on demurrer, that these breaches were not well assigned, for the following reasons:—1. That as the plaintiffs averred that the engineer had taken the works out of their hands, and as, under the agreement they had thereby, forfeited all claim, they should also have shewn that their dismissal did not arise from any fault on their part. 2. That it should have been averred that the quantity of piling done entitled the plaintiffs to a certain specified sum, and the non-payment of that sum should have been stated as a breach; also that the piling should have been shewn to have been done in “Piling in foundations,” as it was only for such piling that any price was specified. 3. That the fact of the engineer having given his certificate, being a material fact, should have been stated positively, and not merely by way of recital: and the name of the engineer should have been given.

For a tenth breach the plaintiffs averred, that after the agreement, certain explanations, plans, &c., became necessary to enable them to carry on the work, but that the engineer, though requested, refused to furnish the same. *Held* bad; for, as the declaration shewed that certain specifications were

annexed to the contract, according to which the plaintiffs were to construct the work, it should have been shewn in respect to what part or description of the work they required *additional* directions: and also that the name of the engineer should have been stated.

As an eleventh breach the plaintiffs averred, that after they had commenced the work according to the agreement, and while they were carrying on the same, the defendants wrongfully and unlawfully ordered them not to proceed, and then wholly dismissed them. *Held*, not necessary to shew a more formal dismissal. *Moore et al. v. The Great Western Railway Company*, 2.

Former recovery—Pleading.]—9. When a former recovery is pleaded, and the action is of such a nature that it cannot be discovered from the record whether the same demand was in question, the plaintiff is not obliged to new assign, but may deny the identity of the cause of action. *Beasley v. Beasley*, 367.

Action for false return—Pleading.]—10. Action against the sheriff for a false return of *nulla bona* to a *fi. fa.* against M.—The defendant pleaded that he as sheriff did take in execution goods and chattels of the said M., under and by virtue of the said writ; and did levy thereout the moneys indorsed thereon, as he was commanded. *Held*, on demurrer, *plea bad*, as admitting the plaintiff's cause of action. *Tyson v. Jarvis*, 378.

Trespass—Plea justifying under void ca. sa.—Replication to.]—11. When a pleading concludes with verification by record, it is not requisite to give a day for inspection, this being unnecessary until the record is denied. In an action

of trespass the defendants justified under a *ca. sa.*, and the plaintiffs replied that the judgment on which the writ issued was for a sum less than £10, exclusive of costs, "wherefore the said writ of *ca. sa.* was and is void." *Held*, on demurrer, that it was unnecessary to aver that the writ was set aside, for the replication shewed it to have been not merely irregular but illegal and void. *Ley v. Louden and Dempsey*, 380.

Bond—Pleading—Former recovery.]—12. Debt on bond. *Plea*—A former action on the same bond in a county court, in which the defendant obtained judgment. *Replication*—that the breaches in this action, and the damages claimed, are different from those in the former action. In the first suit, so appeared from this plea, no breach was assigned, but the non-payment of the penalty. *Held*, on demurrer, replication bad; for the plaintiff having had judgment against him that he should be barred in his action on the bond, was precluded from suing again on it. *Stinson v. Branigan*, 402.

Prescription—Pleading.]—13. To an action on the case for penning back water so as to overflow the plaintiff's land, a plea of prescription was held bad—1st, for claiming the right by user for twenty years before action brought, instead of *next* before, 2ndly, As claiming only a right to erect a dam of a certain height, without applying such defence to the injury complained of or admitting the injury. *Haley v. Ennis et al.*, 404.

Covenant for title—Plea to—Demurrer.]—14. To an action on the covenants for title and right to convey in a deed of bargain and sale, the defendant pleaded that one J. C. was seized in fee, and

had good right to convey, and did convey to the defendant, by means whereof all the estate and title of the said J. C. became vested in the defendant, and the defendant thereby became, and until the making of the indenture declared upon continued to be, seized of as great an estate as the said J. C.—*Verification.* *Held*, on demurrer, plea bad, as being only an argumentative assertion of the defendant's title; and that the defendant should have averred directly that he himself was seized, and need not have set out a derivative title. *Shanahan v. Sheerin*, 600.

POSSESSION.

See ASSIGNMENT, 2.—EVIDENCE, 5.

—FRAUDULENT DEEDS AND ASSIGNMENTS.—LIMITATIONS (STATUTE OF,) 3.

PRACTICE.

See ADMINISTRATION.—AFFIDAVIT.

—AMENDMENT.—APPEAL.—AR-

REST, 2.—ATTORNEY.—BY-LAW.

—ELECTIONS.—EVIDENCE, 2, 10,

—INTERLOCUTORY JUDGMENT.—

LIMITATIONS (STATUTE OF, 2.)—

MUNICIPAL CORPORATIONS, 1.—

NEW TRIAL.

1. Where an order is of such a nature that no one is prejudiced by delay in serving it, such delay is no ground for setting the order aside.—*Wilkes et al. v. McMillan*, 293.

Practice.—Application for discharge from *ca. sa.* refused on account of delay.]—2. The defendant was arrested on a *ca. sa.*—It appeared that the officer who made the arrest had no warrant from the sheriff, though he assured the plaintiff that he had authority to act.—The defendant brought trespass against the plaintiff, and assessed damages. After such assessment, after giving bail to the

limits, and nearly two months after the arrest, he applied to be discharged, and to have the bail bond cancelled. The court, under these circumstances, refused the application. *Kirby v. Henry Finkle and John Finkle*, 365.

Crown Office—Practice.]—3. The court refused a rule to set aside a *fi. fa.* because issued by the officer at his own house before office hours. *Rolker et al. v. Fuller*, 477.

Amendment.]—4. Where the plaintiffs, on demurrer to their replication, had obtained leave to reply *de novo*, but from some misunderstanding omitted to do so in time, and judgment was pronounced on the demurrer, though not entered; the court allowed them to reply *de novo*, on application made in the term after the judgment. *McDougall et al. v. Fish*, 602.

Practice—Order in Chambers putting off trial, Application to court to review.]—5. The court will sometimes grant relief against an order in chambers, by rescinding any part of it which may be unjust or irregular; but they will not add to the terms of a conditional order which has already been acted upon.

A short time before the assizes at Kingston, the defendant obtained from a judge in chambers at Toronto, a summons to put off the trial. The plaintiff's agent (the plaintiff being an attorney), was obliged to obtain delay, to communicate with his principal, who, in the meantime, incurred costs in preparing for trial. The order was afterwards granted on terms of paying *only the costs of the application*, and the defendant acted upon it by getting the trial postponed. The defendant had given no notice to the plaintiff of his intention to move. The court refused to alter the terms of the

order, so as to compel the defendant to pay the plaintiff's costs of preparing for trial while in ignorance of it though they were of opinion that it would have been more fair to have exacted the payment of such costs on granting the order.

Applications to postpone trial in outer counties should not be entertained in chambers at Toronto when the assizes are just coming on. *McKenzie v. Stewart*, 634.

Application for order on Sheriff to make a deed to purchaser.]—6. The court refused to interfere summarily to compel the sheriff to make a deed of a lot sold by him under execution, where it appeared that he had been advised not to complete the sale on account of an irregularity in the advertisement; and that the same land, on being again advertised and exposed to sale under a subsequent writ, brought a price far exceeding that for which it had been purchased by the applicant. *In re Charles Montgomery Campbell and Ruttan, Sheriff*, 641.

PRESCOTT AND RUSSELL (UNITED COUNTIES OF).

Counties of Prescott and Russell—Rate imposed for erection of registry office.]—The Municipal Council of Prescott and Russell passed a by-law to raise a sum of money for building a registry office in the county of Russell; and they enacted that the rate should be levied only on the townships composing that county. This by-law was quashed, on the ground that as the office when built would continue the property of the united counties, until a separation should take place, the expense of erecting it must be borne by both counties in common. *Smith v. The Municipal Council of the United Counties of Prescott and Russell*, 282.

PRESCRIPTION.

See PLEADING, 13.

Obstruction of water-course—Denial of right to natural flow of the water, evidence under—Plea of prescriptive right to obstruct the water to any extent necessary for working mills, not supported by the evidence—Questions arising under such plea—Presumption of grant—Effect and object of Prescription Act.]—1.

Case for obstruction of water-course. The declaration stated that the plaintiffs were lawfully possessed of a certain close, together with a woollen mill and manufactory, upon a certain water-course, and were entitled to have the said water-course flow in its usual and proper course to their mill, to supply the same with water; and they complained that the defendant had wrongfully penned back the water, and prevented it from running in its natural course to their close and mill. The defendant pleaded, 3rdly, by denying the right of the plaintiffs to the natural flow of the stream. 6thly, a plea of prescription, setting forth that more than twenty years before the suit—viz., in 1820 and until 1838, there was a saw-mill on the stream; that in 1838 it was removed, and a clover-mill erected in its place, which last mentioned mill was removed in 1846, and within a year from its removal a grist-mill was put up; that the occupiers of these several mills, for twenty years, before the commencement of this suit, enjoyed the right without interruption, of keeping back the water to such an extent and for such a time, as was necessary to enable the occupiers, for the time being, of the said mills, to make full use of the said water, for beneficially using the said mills respectively; and that, to

enable them so to use the said mills, it was not at any time necessary for the occupiers thereof to, nor did the defendant keep or continue set up or closed any mill dams, &c., across the said stream, to obstruct the water to any greater extent, or for any long time, than had theretofore, during the existence of the said mills, so destroyed and removed as aforesaid, been necessary for beneficially working and using the same: that, before, and at the times, &c., the defendant was the occupier of the gristmill last aforesaid, and in order to enable him to make use of the water for working the same, it became necessary for him to, and he did keep up and close the said mill-dam, and thereby necessarily obstructed the water to and for such and no greater extent and time than was necessary to enable him beneficially to use his mill—*quæ sunt eadem, &c.* The plaintiffs joined issue on the 3rd plea, and traversed the averments in the sixth. *Held*, that the 3rd plea only put in issue the alleged natural right of the plaintiffs, by reason of their possession, as alleged in the declaration; and that no evidence was admissible under it to shew that such general right had been lost by reason of any conflicting right acquired, on any special ground, by the defendant. *As to the sixth plea*—1st. That it must be considered as a plea of prescriptive right under the act of 10 & 11 Vic. ch. 5; and, therefore, that the enjoyment must be for twenty years next before the commencement of the suit. How the enjoyment for twenty years, not carried up to the time of the action, might have availed as a foundation for presuming a grant, independently of the statute, could not be considered under the pleadings; though

semble, that the evidence given would have been insufficient for that purpose. 2nd. That whether a year did or did not elapse after the saw mill was removed before the clover mill was worked by water, was immaterial; for the interruption intended by the statute is an adverse interference with the enjoyment, not a voluntary abstaining from user by the defendant. 3rd. That the only question, under the evidence, was, whether the enjoyment of the alleged easement, such as was shewn between 1839 and 1846, was sufficient to support the plea: that, with regard to this, the point to be considered was, to what extent had the defendant enjoyed the privilege of obstructing the water for twenty years; not to what height the dam had been kept up—*i. e.*, to what extent he had *prepared means* for such obstruction. 4th. That the evidence in this case—which shewed that while the clover mill was in existence (from 1839 to 1846) the stream was used only for one or two months in the year, at a time when the water was high, and when for all that appeared such user occasioned no injury or detention, would not support the defence of prescriptive right to the extent pleaded. *McKechnie et al. v. McKeyes*, 37.

10 & 11 *Vic. ch. 5—Prescription—Life Estate—Pleading.*]—2. In case for overflowing the plaintiff's land, the defendant pleaded the enjoyment of a right for twenty years—the replication simply traversed the enjoyment.—*Held*, that the plaintiff could not give in evidence a life estate outstanding, as tenant by courtesy, but must, by sec. 5 of 10 & 11 *Vic. ch. 5*, reply that fact specially. *Stuart v. Spence*, 486.

PRESUMPTION.

See DEED—MARRIAGE—PRESCRIPTION—RECEIPT.

PRINCIPAL AND AGENT.

See PROMISSORY NOTES, 4—CHATTEL MORTGAGES, 3.

PROMISSORY NOTES.

See EVIDENCE, 1, 7.

Notes endorsed to Bank for collection—Their liability for want of due diligence in presentment.]—1. The plaintiffs indorsed a promissory note to the defendants, for collection. The note was made by one C. C. living at Cobourg, payable to the order of one G. S. B. generally, not at any bank or other place; and from G. S. B. it had passed, by several indorsements, to the plaintiffs. After it had been received by the defendants, it was indorsed by their teller at Toronto in favor of J. T., their agent at Cobourg. The different indorsers were notified by the Bank that the note had been presented to the maker, and payment refused, and that the Bank looked to them for payment; and the note was returned to the plaintiffs as having been duly presented. The plaintiffs then sued the indorsers, but were defeated in their actions, in consequence of a want of proper presentment for payment. *Held*, that, under the circumstances of this case, the Bank were liable to the plaintiffs for such want of presentment, notwithstanding a notice issued by them, and which the plaintiffs had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities or mistakes, in

respect of such notes. *Browne et al. v. The Commercial Bank of the Midland District*, 129.

Promissory note—Fictitious payee.]—2. Where a note is made payable to a fictitious payee, and not to his order, or bearer, a person receiving it from a third party for value cannot maintain an action against the maker by declaring as on a note payable to bearer. *Williams v. Noxon*, 259.

Promissory Note — Consideration — Pleading.] — 3. Assumpsit against the maker of a note made payable to bearer, and averred to have been delivered by the defendant to the plaintiffs. *Plea*—That the note was made for the accommodation of A. C. and J. C.; that there never was any consideration or value for the payment by defendant of any part of said date, and that the plaintiffs always held, and now hold the same without any value or consideration. *Held*, on demurrer, plea bad. *Muir et al. v. Cameron*, 356.

Promissory note—Notice of non-payment.]—4. A. proposed to give his note, indorsed by defendant, in payment for goods, stating that the defendant lived at Lindsay. He subsequently made the note payable to defendant, procured his endorsement, and transmitted it to his creditor at Toronto. *Held*, that the maker must be considered as the agent of the indorser: that his statement of the indorser's place of residence rendered further inquiry unnecessary, and therefore that a notice of non-payment duly mailed to Lindsay, was sufficient. *Held*, also, that the above facts supported an allegation of due notice. *McMurrich v. Powers*, 481.

QUIET ENJOYMENT.

See COVENANT — HIGHWAY, 2—PLEADING, 3.

RECEIPT.

Receipts for purchase-money of land—Omission of purchaser's name, effect of—Land Sales Act 4 & 5 Vic. ch. 100.]—The plaintiff produced two receipts for certificates of deposits to the credit of the Receiver General, on a purchase of certain lands. In both receipts the money was expressed to have been received from the plaintiff; in the first a blank was left for the name of the person to whom the sale was made, the words "sold to" being inserted: in the second no mention was made of the purchaser. *Held*, that the receipts imported a sale to the plaintiff, in the absence of any proof to the contrary. *Young et al. v. Scobie*, 372.

RECOGNIZANCE.

See LIMITS.

Recognizance of bail — Action against one alone, where others bound.]—Where an action was brought on a recognizance of bail against one of the bail alone, and it appeared by the declaration that others were jointly bound, it was held that the objection was fatal, and might be taken advantage of without a plea in abatement. The plea in this case was clearly bad. *Mills v. McBride*, 145.

RECORD (NISI PRIUS.)

1. The want of an appearance on the Nisi Prius record in ejectment may be amended after trial; but the objection is waived, and the amendment unnecessary, if the defendant appear at the trial, and going into his defence. *Johnson et al. v. McKenna*, 520.

Nisi Prius record in ejectment—Irregularities in.]—2. In a Nisi Prius record in ejectment the first *placitum* was of Trinity term, 14 Vic. 1851, instead of 1850; and the second of Hilary term, 15 Vic.

1851, instead of 14 Vic.—the year of our Lord being wrong in the first place, and the year of the reign in the second. These objections were overruled at the trial, and afterwards renewed in banc. The court would not entertain such objections as a ground for setting aside the verdict, and would have allowed an amendment if necessary, but they held it not to be required, as the record might be made correct by rejecting what was inaccurate. *Quære*, Whether the 40th rule of H. T. 13 Vic. does not apply to ejectments, and whether, therefore, there was any ground for the exception taken? An award of *venire* is not necessary. The facts of this case were similar to those in *Doe Tiffany v. Miller*, and the judgment given there was commented upon and adhered to. *Doe dem. Springer v. Miller*, 57.

REGISTRATION.

See ASSIGNMENT, 2. — CHATTEL MORTGAGES. — FRAUDULENT DEEDS AND ASSIGNMENTS.

Lease—Assignment—Registry—9 Vic. ch. 34.]—A leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term, unless he should choose to pay for the improvements—this lease was registered. The lessees then assigned part of the premises, and the assignee did not register. C. devised his interest to B., who subsequently mortgaged the whole premises to the plaintiffs—this mortgage was registered. *Held*, that the covenant for renewal did not extend the term so as to bring the lease within 9 Vic. ch. 34; that the unnecessary registration of it did not make it requisite to register the assignment, and therefore that the mortgage to the plain-

tiffs could not affect the premises assigned. *Doe dem. Kingston Building Society v. Rainsford*, 236.

REGISTRY OFFICES.

See PRESCOTT AND RUSSELL (UNITED COUNTIES OF.)

Removal of.]—The powers with respect to the removal of registry offices, given to the District Councils by 9 Vic. ch. 34, sec. 19, are now vested in municipal councils for counties.—*Fraser v. The Municipal Council of Stormont, &c.*, 286.

RENT-CHARGE.

See DEBT—EXECUTION.

RENT.

See LEASE.

REPLEVIN AND REPLEVIN BOND.

See NOTICE OF ACTION, 1.

Avowry under distress for rent—Eviction by paramount title—Evidence—Plea of "non tenuit."]—In an action of replevin, the defendants avowed under a distress for one quarter's rent, due to S. B., one of the defendants, on a demise to the plaintiffs at a quarterly rent. The plaintiffs replied—1st, *Non tenuerunt*; 2ndly, That the said S. B. had previously leased a portion of the premises demised to them to one Parker, for a term unexpired, and that Parker evicted the plaintiffs. To the last plea the defendants rejoined, that the plaintiffs voluntarily delivered up possession of such portion to Parker, and elected to remain as tenants of the remainder for the time and at the rent in the avowry mentioned. It was proved that Parker, having a lease from S. B. including a narrow strip of land demised to the plaintiffs, and which had been used by them as a passage to the rear of their premises, began about the middle of the quarter

previous to that for which the rent was claimed to put up a building which covered such passage; that in lieu of that entrance another was opened on the north side of the house, on land belonging to S. B., and paved with boards taken from the old passage; that the men who did this work were employed by the plaintiffs at Parker's request, and were sent by them to him to be paid; that this change of the passage was proposed by the plaintiffs, as they said it would answer them as well. After it was made the plaintiffs paid the rent for the following quarter, claiming no deduction. When the next quarter's rent fell due they refused to pay, claiming an abatement for alleged injuries caused by the erection of Parker's new building, but not for the obstruction of the passage way. This was refused as a separate action was then pending for those injuries. The defendants distrained, and thereupon this action was brought. *Held*, that the defendants could not support their avowry as for rent reserved on the whole of the premises under the original letting, for no interest passed to the plaintiffs in that part which had been previously demised; that the plaintiffs were not precluded by their assent from setting up an eviction by paramount title which they could not have resisted; and that, under the pleadings, they were therefore entitled to a verdict. *ROBINSON, C. J.*, *dissentiente* on the ground that the evidence of consent on the part of the plaintiffs was sufficient to warrant the jury in finding that there was no eviction; and that the arrangement between Parker and the plaintiffs did not put an end to the original lease, so as to prevent the defendants

from avowing under it. *Carey et al. v. Bostwick and Higgins*, 156.

Replevin bond, form of—*Plea*, "no rent in arrear."—2. A replevin bond entered into by the principal and three sureties is sufficiently in accordance with the directions of 4 W. IV. ch. 7; and the assignee of such bond may sue in his own name.

In debt on a replevin bond the declaration set out that the plaintiff had distrained goods of H. S. N. and J. V. N., which were claimed by the now plaintiff, who replevied. The defendant pleaded "no rent in arrear," which was held clearly bad as being a defence which should have been pleaded to the avowry in the original action, if at all. *Meyers v. Maybee*, 200.

RESOLUTION. (OF MUNICIPAL COUNCIL.)

See MUNICIPAL CORPORATIONS, 1.
REVISION (COURT OF).

See TAXES.

ROMAN CATHOLIC SCHOOLS.

See COMMON SCHOOLS.

SALE.

See RECEIPT.

SCHEDULE.

See ASSESSMENT, 2.

SCHOOLS.

See COMMON SCHOOLS.

SET-OFF.

See EVIDENCE, 7—LIMITATIONS, (STATUTE OF), 1—PENALTY, 1.

SHERIFF.

See APPEAL 2—PARTNERS AND PARTNERSHIP, 2—PRACTICE, 6.

SHERIFF'S DEED.

Sheriff's sale—*More land conveyed than sold*—*Effect of such conveyance*—*Power of sheriff afterwards to make a correct deed*—*What is an inception of execution of writ*

against lands.]—The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it in such terms that on the face of the deed no parcel could be distinguished from the rest, and allowed to pass alone; *Held*, that he must be considered in the same light with any other person having a power to execute; that he could not be regarded as *functus officio* by the execution of the first deed, which was wholly inoperative and void; and that he might therefore, in 1849, make a deed of the part actually sold.

Quære. Whether, in this case, the debtor having a title to all the land conveyed, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone, under such circumstances, though the case might be otherwise if the mistake had arisen from including land not owned by the debtor?

Quære, also; Whether the proper course would not have been to apply to the court to set aside what had been done under the execution? Burns, J., concurred also in the judgment of the court on other points in this case, before reported. *Doe dem. Tiffany v. Miller*, 65.

SHERIFF'S SALE.

See PRACTICE, 6.

SIDE LINES.

See SURVEY.

SLANDER.

See LIBEL.

STATUTES (CONSTRUCTION OF).

21 Jac. 1. ch. 16—See "Limitations (Statute of)," 1.

22 & 23 Car. II.—See "Costs."

22 Car. II. ch. 3.—See "Frauds (Statute of)."

5 Geo. II. ch. 7.—See "Lands."

50 Geo. III. ch. 1, 59 Geo. III. ch. 1, and 4 Geo. IV. sess. 2, ch. 10—See "Highway," 4.

2 Geo. IV. ch. 5.—See "Articled Clerk."

8 Geo. IV. ch. 1—See "Ordinance."

2 W. IV. ch. 35—See "Partition."

4 Wm. ch. 1—See "Limitations (Statute of)," 3, 4.

5 W. IV. ch. 3—See "Arrest," 1.

6 W. IV. ch. 18, sec. 2—See "Insurance," 1.

4 & 5 Vic. ch. 10, sec. 41—See "By-law," 1.

4 & 5 Vic. ch. 100—See "Land Sales Act."

7 Vic. ch. 11—See "Ordinance."

8 Vic. ch. 13, sec. 57—See "Appeal," 3.

8 Vic. ch. 48—See "Insolvent and Insolvency."

9 Vic. ch. 34—See "Registration."

10 & 11 Vic. ch. 5—See "Pleading," 13—*"Prescription."*

10 & 11 Vic. ch. 31—See "Customs Act."

12 Vic. ch. 30—See "Crown Lands Agent."

12 Vic. ch. 35—See "Survey."

12 Vic. ch. 74, and 13 & 14 Vic. ch. 62—See "Assignment," 2—*"Chattel Mortgages,"*—*"Fraudulent Deeds and Assignments."*

12 Vic. ch. 81—See "By-law"—*"Highway,"* 1, 3—*"Town Councillors,"*—*"Municipal Corporations,"* 2.

13 & 14 Vic. ch. 48—See "Common Schools."

13 & 14 Vic. ch. 53—See "Execution," 2.

13 & 14 Vic. ch. 61—See "Limitations (Statute of)," 1, 2.

13 & 14 Vic. ch. 132—See "By-law," 2.

14 & 15 Vic. ch. 54—See "Notice of Action."

14 & 15 Vic. ch. 66—See "Evidence," 2.

14 & 15 Vic. ch. 114—See "Ejectment."

16 Vic. ch. 19, sec. 2—See "Evidence," 10.

SUMMONS.

See ELECTIONS.

SURVEY.

Side lines of lots, how ascertained—Survey—12 Vic. ch. 35, case within 36th section of—*Construction of 32nd section.*—In the original survey of the township of K., which was made by alternate concessions, the lines in front of the first and rear of the second concessions were run, and a single

row of posts planted along the latter to divide the space into two hundred acre lots. The line between the first and second concessions was afterwards surveyed under instructions from Government, and divided off into lots of the same size. *Held*, A case within the 36th section of 12 Vic. ch. 35; and therefore that the side lines of lots in the second concession should be ascertained by the posts of the original survey on the line in rear of that concession, and not by those of the subsequent survey on the division line between the first and second concessions. *McDonell v. McDonell*, 350.

TAXES.

Mandamus—Court of Revision—Taxation of property.—The court refuse to interfere by mandamus to compel a municipal council to alter the assessment of the applicant's property as settled on appeal by a court of revision.

They also declined to express any opinion as to the principle to be adopted in the taxation of property—whether the intrinsic value only should be regarded, or whether the amount which it could be or has been leased for, or what it does in fact produce to the proprietor, should be taken into consideration. *In re William Dickson and the Municipal Council of the Village of Galt*, 395.

TENDER.

The evidence given in this case showed a sufficient tender. *Reynolds v. Allan*, 350.

TIME, (COMPUTATION OF).

See CHATTEL MORTGAGES, 2—PARTITION, 2.

TITLE.

See COVENANT—EVIDENCE, 5, 9—INSURANCE—PLEADING, 14.

TOLLS.

Carriages conveying the mail are not exempted from payment of tolls. *Paris and Dundas Road Company v. Babcock*, 335.

TOWN COUNCILLORS.

Qualification for.—Under 12 Vic. ch. 81, sec. 65, as amended by 14 & 15 Vic. ch. 109, schedule A, part 12, candidates for town councillors must be not only assessable, but assessed for the necessary amount of property.—*The Queen ex rel. Metcalf v. Smart*, 89.

TRESPASS.

See COSTS—CROWN LANDS AGENT—EVIDENCE, 5—HIGHWAY, 4—INTERPLEADER.

Trespass—Fi. fa. set aside—Sale under—Liability of plaintiff for acts of sheriff.—A. gave to B. a cognovit, with an agreement that judgment was to be entered immediately but no execution to issue, except in certain events. On the 8th of November B. put a *fi. fa.* in the sheriff's hands, and on the 18th A.'s goods were seized at his store at St. Thomas, but he was allowed to retain them on giving security to the sheriff. After the seizure A. obtained a summons to set aside the *fi. fa.* for breach of faith, which was enlarged at B.'s request. On the 13th of January, while the application was pending, B.'s attorney telegraphed to his agent at London not to let the sheriff close A.'s store. The sheriff then requested instructions from the agent what to do, but received none; afterwards this agent told him of reports that A. was selling the property, &c., and suggested a sale—and the sheriff accordingly sold a portion of the goods on the 16th and 17th of January. On the 17th the sheriff, received orders not to proceed, and immediately

stopped the sale; he had no notice of the summons—which was made absolute on the 22nd of January.

Held, that the *fi. fa.* having been set aside, as obtained by B. on a judgment entered contrary to good faith, B. was liable to A. in an action of trespass for all damages sustained from the sale, as well as the seizure. *Jacobs v. Robb et al.*, 276.

Trespass—Ejectment—Evidence.]

—One F. rented the *locus in quo* from the plaintiff previous to May, 1851, when he went out, and the defendant obtained possession; the plaintiff recovered in ejectment, in which the demise was laid on the 14th of June, 1851, and entered his judgment in March, 1852; he then brought trespass *qu. cl. fr.*, alleging the trespass to have been committed on the 5th of July, 1851. The trespass proved was in May, 1851, while F. was in possession; but *held*, that the action was maintainable, for the recovery in ejectment entitled the plaintiff to treat the defendant as a trespasser from the day of the demise. —*Foster v. Foster*, 607.

TROVER.

See EVIDENCE, 1—DAMAGES, 1—
FIXTURES—PARTNERS AND PART-
NERSHIP.

USURY.

Party to a suit calling the opposite party, how far bound by his evidence.—Where a party to a suit calls the opposite party, he is not necessarily concluded by his answers. Ejectment on a mortgage—The defendants pleaded usury; and they produced two papers, purporting to be copies of letters written by the mortgagor to the plaintiff (the mortgagee as tending to shew that they were replies made by the mortgagor to letters written by the plaintiff, which

were produced; and they relied upon the whole correspondence as making out clearly a usurious bargain. The plaintiff was called and swore that he had never received the letters of which the defendants professed to produce copies, and that there was no usury in the mortgage transaction. *Held*, that it should nevertheless have been left to the jury to say whether they did not believe, from the plaintiff's own letters, that such answers had been received as the defendants relied upon; and if so, whether on the whole correspondence there was sufficient proof of usury.—*Mair v. Culy and Young*, 321.

VARIANCE.

See LIBEL.

VENDOR & VENDEE.

Sale of flour deliverable on board in good condition—Damage received while waiting for vessel—Liability for.—On the 4th of June, 1852, the plaintiff bought from the defendants, through their agents, 1100 barrels of flour, and received a sale note as follows:—

“TORONTO, June 4th, 1852.

Messrs. C. & W. Wadsworth,

“I have this day sold for your account 1100 barrels of flour at the Humber, guaranteed to inspect as No. 1 superfine in Montreal, Boston, or New York, deliverable free on board in good order and condition 16s. 9d. per barrel.”

Having made the purchase he wrote to G., with whom the flour was stored at Milton Mills, on the River Humber, subject to the defendants' order, saying that he expected the steamer *Marion* would be at the Humber in the morning, and that he proposed shipping this flour on board of her. On the 5th of June he wrote again to G., saying that the steamer would be ready to commence loading on the

morning of the 7th, and desiring him to arrange accordingly. On the 7th, the defendants gave to the plaintiff their written order upon G. to deliver the flour to the plaintiff or order, and the plaintiff transmitted that order to C. with directions to ship the flour on the *Marion*, consigned to certain persons in Boston, the defendants to pay shipping charges. The flour was shipped on the 9th, but when G. received the plaintiff's notice he had immediately sent it down the river to be ready for the steamer; while waiting there in the scow there was much rain, and when the flour reached Boston it was found to be injured. The jury found that the plaintiff was entitled to £62 damages of which £50 was occasioned by wet while in G.'s warehouse, and £12 while in the scow.

Held, on motion for a new trial, that the plaintiff's conduct was not such an interference as to take the flour out of the hands of the defendants, or their agent, from the time of leaving the mills, and to relieve them from liability for damage received while in the scow, and that the verdict must therefore be allowed to stand. *Wilmot v. Wadsworth et al.*, 594.

VENUE.

The evidence given by the plaintiff in this case was held not a sufficient compliance with the usual undertaking on changing the venue.—*Miller v. Darrow*, 349.

VERDICT.

See ASSETS—INCONSISTENCY.

1. On a plea of *ne unques* executors by two, the plaintiff may have a verdict against one only.—*The Earl of Elgin v. Slawson and Horner, executors of Wm. Swartz, deceased*, 289.

2. *Action against Carriers—Non-joinder—Evidence of improper conduct.*—In an action against four, the declaration stated that the defendants were proprietors of a common stage coach for carrying passengers from T. to B.; that they received the plaintiff as a passenger for certain reward in that behalf; and by reason thereof it became and was the defendants' duty to use due care and diligence in conveying the plaintiff; yet they, not regarding their duty, did not use due diligence, &c., but by reason of the carelessness and improper conduct of the defendants, by their servant, in conveyance of the plaintiff, he was thrown off the said coach, and injured, &c. *Held*, that upon this declaration a verdict might be given against three of the defendants, and for the other. *Gunn v. Dixon, Playter, Elgie, and Bell*, 461.

WILL.

See ESTOPPEL, 3.

What interest taken by executors.

—1. In 1848, J. H. by her will devised as follows:—"The charges of my declining days and my funeral first to be paid, after which *I give and bequeath all my real estate, known as &c., to be sold to the best advantage, and which is to be divided in manner and form as follows.*" Certain legacies were granted to children and grandchildren, and the remainder of the estate was directed to be equally divided between two daughters of the testatrix. The will concluded thus—"for the execution of this my last will and testament, and I hereby nominate and appoint A. B., S. H., and W. H., joint executors, hereby giving them full power to settle all business by me kept unsettled, hereby revoking

all other and former wills by me at any time heretofore made.

Held, that the executors took a power not a legal estate. *Hopkins v. Brown*, 125.

2. *Estate tail, or in fee.*—W. F. died in 1841, leaving a will as follows: "I will and devise unto my son C. F., all and singular that farm, &c., the same to be by him the said C. F., peaceably possessed and enjoyed for and during his natural life; and after his decease I will and devise the same to the heirs of the said C. F.; and to their heirs and assigns forever; * * * * * and in the event of either of my sons C. F., I. B. F., or R. F., or either of my daughters, S. F. or M. F. dying *before they come of lawful age, or without lawful issue*, then, and in such case, the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike." C. F. died at the age of thirty, and unmarried. *Held per Cur.*, that the plaintiff, as heir-at-law of the testator, could not recover. The opinion of the Chief Justice upon the construction of the will was, that the word "or" should be read "and"; and that C. F. took an estate in fee, subject to an executory devise over, in case he should die under age, and without issue.

BURNS, J., considered that the will should be read without alter-

ation; that C. F. took an estate tail, and therefore that on failure of such estate the devise over took effect. *Doe dem. Forsyth v. Quack-enbush*, 148.

3. *Estate in fee, or for life?*—J. C. died in 1809, leaving a will as follows: He first devised different lands to his wife and children, giving them clearly an estate in fee; then in a subsequent clause he gave and bequeathed, "*in like manner as before*," to his wife the land in question, with other lots in the same concession, "together with the equal third of all and singular of the property I now live in, to be for her support during her lifetime or widowhood, at which period it goes to such of my children as she may direct, the real and personal estate, to have and to hold *the above described land as before described*, with and every appurtenance thereunto belonging, *unto my said wife, her heirs and assigns forever.*" The land on which the testator lived was in a subsequent clause devised in fee to his son J. C. *Held*, that the words "the above described land" should be referred only to that described by lots; and that the widow took an estate in fee in that, and a life estate with a power of disposal over in the land on which the testator lived—*Campbell v. Fretwell et al.*, 328.

WORDS (CONSTRUCTION OF).

"Now pending." See Guarantee 1.



